

No. 16274

United States
Court of Appeals
for the Ninth Circuit

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation, Appellant,

vs.

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation, Appellees.

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation, Appellants.

vs.

SWIFT & COMPANY, a Corporation, Appellee.

Transcript of Record

Appeals from the United States District Court for the District of Arizona

FILED

FEB 25 1959

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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a corporation.

In the District Court of the United States
For the District of Arizona

No. Civ. 909-Tuc.

SWIFT & COMPANY, a corporation, Plaintiff,

vs.

ARIZONA YORK REFRIGERATION COM-
PANY, a corporation, and SOUTHERN ARI-
ZONA YORK REFRIGERATION COM-
PANY, a corporation, Defendants.

AMENDED COMPLAINT

Comes now the plaintiff by its attorneys, Boyle, Bilby, Thompson & Shoenhair, and for cause of action against defendants alleges as follows:

Count One

1. Plaintiff is a corporation incorporated under the laws of the State of Illinois and authorized to do business in the State of Arizona; defendants are domestic corporations incorporated under the laws of the State of Arizona and authorized to do business in this state; the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2. On or about May 31, 1955, defendant Arizona York Refrigeration Company entered into a contract with plaintiff to do certain work for plaintiff at 950 East 17th Street, Tucson, Pima County, Arizona.

3. Under said contract defendant Arizona York Refrigeration Company, both expressly and impliedly, warranted all equipment, material and workmanship furnished by defendant Arizona York Refrigeration Company against defects.

4. On or about December 5, 1955, the express and implied warranty provided under said contract was breached by defendant Arizona York Refrigeration Company when ammonia escaped from defective equipment installed by defendant Arizona York Refrigeration Company. Said ammonia contaminated products of plaintiff stored at 950 East 17th Street, and damaged part of the building located at said address.

5. As a result of said breach of warranty, plaintiff suffered damages in the amount of \$10,322.60.

Count Two

1. Adopts paragraph 1 of Count One as hereinbefore set forth.

2. On or about May 31, 1955, and at other times thereafter, plaintiff, expressly and by implication, made known to the defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company the particular purpose for which certain goods were required, and plaintiff relied on defendants' skill and judgment in so doing.

3. Thereafter plaintiff purchased certain goods from the defendants, which goods were installed by defendants at 950 East 17th Street. Plaintiff, in

purchasing said goods from the defendants, relied upon the defendants' skill and judgment and relied upon the implied warranty of the defendants that the goods were reasonably fit for the purpose for which they were intended.

4. Defendants breached said implied warranty in that they sold, furnished and installed goods that were not reasonably fit for the purpose for which they were intended, as a result of which breach large quantities of ammonia escaped from said goods contaminating large quantities of plaintiff's products stored upon its premises at 950 East 17th Street and damaging portions of plaintiff's premises at 950 East 17th Street.

5. As a result of said breach, plaintiff suffered damages in the amount of \$10,322.60.

Count Three

1. Adopts paragraph 1 of Count One as hereinbefore set forth.

2. Defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company did certain work during 1955 at 950 East 17th Street for the plaintiff, for which they were adequately compensated.

3. Said work was done in a careless and negligent manner.

4. On or about December 5, 1955, as a result of said negligent and careless work, ammonia contaminated products of the plaintiff stored at 950 East

17th Street, and said ammonia damaged parts of the building located at said address.

5. As a result of said careless and negligent work and the subsequent contamination of said goods and damages to said building, plaintiff suffered a loss in the amount of \$10,322.60.

Wherefore, plaintiff prays judgment against the defendant Arizona York Refrigeration Company or defendant Southern Arizona York Refrigeration Company, or against both defendants, in the amount of \$10,322.60 and for its costs herein expended.

BOYLE, BILBY, THOMPSON
& SHOENHAIR,
/s/ B. G. THOMPSON, JR.,
Attorneys for Plaintiff.

Notice of Mailing Attached.

[Endorsed]: Filed February 7, 1958.

In the District Court of the United States
For the District of Arizona

Civ. No. 909—Tuc.

SWIFT & COMPANY, Plaintiff,

vs.

ARIZONA YORK REFRIGERATION COM-
PANY, a corporation, and SOUTHERN ARI-
ZONA YORK REFRIGERATION COM-
PANY, a corporation,

Defendants and Third-Party Plaintiffs,

vs.

AUTHORIZED SUPPLY COMPANY OF ARI-
ZONA, an Arizona corporation,

Third-Party Defendant.

ANSWER TO AMENDED COMPLAINT

Come now the defendants and answer the Amended Complaint on file herein as follows:

First Defense

The Amended Complaint on file herein, including each of Counts One, Two and Three, fails to state a claim against the defendants and each of them upon which relief can be granted.

Second Defense

Answer to Count One

I.

Admit the allegations contained in paragraphs 1 and 2 of the Amended Complaint.

II.

Deny each and every allegation contained in paragraphs 3, 4 and 5, and specifically deny that the plaintiff suffered damages in any sum or amount whatsoever by reason of any breach of warranty. Deny that any warranty expressed or implied was breached by Arizona York Refrigeration Company.

III.

Deny each and every allegation contained in Count One not herein expressly admitted.

IV.

As a further and separate defense, allege that if plaintiff sustained any damage to products or property by reason of escaping ammonia at 950 East 17th Street, Tucson, Arizona, same was solely the result of defective refrigeration coils sold and furnished to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company by Authorized Supply Company of Arizona, which said coils had been manufactured by the Bush Manufacturing Company of West Hartford, Connecticut. In this connection, allege that the defects in said coils, if any, were neither known to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company at any of the times referred to in the Complaint or material in the premises, nor were any such defects discoverable by either or both Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company in the exercise of reasonable or ordinary care.

Allege that neither Arizona York Refrigeration

Company nor Southern Arizona York Refrigeration Company is responsible for or liable to the Plaintiff for any damage sustained by it as a result of any such defects in said refrigeration coils manufactured by the said Bush Manufacturing Company and sold and furnished to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company by Authorized Supply Company of Arizona.

Answer to Count Two

I.

Adopt by reference each and every allegation contained in paragraphs I and IV of their Answer to Count One of the Amended Complaint and incorporate same in this, their Answer to Count Two as if same were fully set out herein.

II.

Deny each and every allegation contained in paragraphs 2, 3, 4 and 5, except admit that a certain contract was entered into between plaintiff and Arizona York Refrigeration Company on or about May 31, 1955, whereby said Arizona York Refrigeration Company was to do certain work for plaintiff at 950 East 17th Street, Tucson, Arizona.

Further answering paragraphs 2, 3, 4 and 5, deny that plaintiff sustained any damage to products or property in any sum or amount whatsoever by reason of any breach of any warranty by either or both Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, and deny that any warranty or warranties, implied or other-

wise, were either made or breached by either or both Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.

III.

Deny each and every allegation contained in Count Two not herein expressly admitted.

Answer to Count Three

I.

Adopt by reference each and every allegation contained in paragraphs I and IV of their Answer to Count One of the Amended Complaint and incorporate same in this, their Answer to Count Three as if same were fully set out herein.

II.

Deny each and every allegation contained in paragraphs 2, 3, 4 and 5, except admit that Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company did certain work for Plaintiff from and after May 31, 1955, for a stated consideration.

Specifically deny that plaintiff sustained any damages in any sum or amount whatsoever as a result of any acts or omissions of either or both Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, and deny that the said work was done in either a careless or negligent manner. In this connection alleges that the whole of said work was done in a careful and workmanlike manner, in full compliance with all of the terms,

conditions and specifications under which said work was to be done.

III.

Deny each and every allegation contained in Count Three not herein specifically admitted.

IV.

As a further and separate defense allege that the negligence of the plaintiff was a contributing cause to any damage sustained by the plaintiff.

Wherefore, defendants pray:

1. That plaintiff take nothing by its Complaint;
2. That the Complaint be dismissed;
3. That if a judgment be granted against either or both Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company and in favor of Plaintiff, said Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company have and be granted a judgment over against Authorized Supply Company of Arizona for the whole amount of any such judgment, including any costs assessed as a part of any such judgment;
4. For their costs incurred herein, and for such other and further relief as the Court deems proper.

DARNELL, HOLESAPPLE,

McFALL & SPAID,

/s/ By RICHARD C. BRINEY,

Attorneys for Defendants.

Notice of Mailing Attached.

[Endorsed]: Filed March 3, 1958.

[Title of District Court and Cause.]

SECOND AMENDED THIRD-PARTY
COMPLAINT

Count One

Comes now Southern Arizona York Refrigeration Company, and for its complaint against Authorized Supply Company of Arizona, an Arizona corporation, third-party defendant, alleges as follows:

I.

At all times hereinafter mentioned Authorized Supply Company of Arizona was and is a corporation organized and existing under and by virtue of the laws of the State of Arizona and at all times herein mentioned was and is doing business within the jurisdiction of this Court.

II.

That plaintiff, Swift and Company, has filed an Amended Complaint, a copy of which is hereto annexed and marked Exhibit "A", against Arizona York Refrigeration Company, and Southern Arizona York Refrigeration Company, to recover damages to plaintiff's products and building allegedly resulting from an ammonia leak which occurred on or about December 5, 1955, on plaintiff's premises at 950 East 17th Street, Tucson, Arizona.

III.

The Amended Complaint of the plaintiff, Swift and Company alleges, among other things, that the

said incident or occurrence was the result of breaches of express and implied warranties alleged to run from defendants to plaintiff, in particular stating in Count One of the Complaint that by express and implied warranty defendant Arizona York Refrigeration Company warranted all equipment, material and workmanship against defects and alleges further in Count Two of the Complaint that plaintiff made known to defendants the purposes for which said goods were required and relying upon defendants' skill and judgment and relying upon the implied warranty of defendants that the goods were reasonably fit for the purpose for which they were intended, purchased said goods or equipment.

IV.

Alleges on information and belief that the ammonia leak referred to herein and in the plaintiff's amended Complaint was occasioned by and was solely the result of defective refrigeration coils sold and furnished to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company for good and valuable consideration during the year 1955 by Authorized Supply Company of Arizona, and were manufactured by the Bush Manufacturing Company of West Hartford, Connecticut.

Further alleges that the said refrigeration coils were by their very nature inherently dangerous to person or property.

V.

As part of the contract of purchase of said refrigeration

eration coils, the third-party defendant, Authorized Supply Company of Arizona, represented and warranted to the Arizona York Refrigeration Company and to Southern Arizona York Refrigeration Company that the said refrigeration coils were reasonably fit for the purposes for which same were manufactured and designed, to wit: to operate as an integral part of a refrigeration system and properly and safely carry and contain the refrigerant, which said warranty is also by the usage of trade annexed to the sales of like items.

Arizona York Refrigeration Company expressly and by implication, made known to third-party defendant the particular purpose for which said goods were required, to wit: installation in and operation as an integral part of a refrigeration room and system for Swift and Company at 950 East 17th Street, Tucson, Arizona, and Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company relied on the skill and judgment of third-party defendant, the latter thereby warranting that the said goods were reasonably fit for such purpose.

Under the said contract of purchase, third-party defendant expressly and impliedly warranted against defects all goods, equipment and materials furnished by them to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.

VI.

Any damage to plaintiff, Swift and Company, or to its property, personal or real, was the direct and

proximate result of the breach by Authorized Supply Company of Arizona of the aforesaid warranties.

VII.

Third-party plaintiff, Southern Arizona York Refrigeration Company, has succeeded to all rights, claims and causes of action heretofore existing in Arizona York Refrigeration Company arising out of the aforesaid purchase of refrigeration coils from Authorized Supply Company of Arizona.

The aforesaid warranties, express and implied, from third-party defendant, Authorized Supply Company of Arizona, have been assigned and inure to the benefit of third-party plaintiff, Southern Arizona York Refrigeration Company, by law, and said third-party plaintiff, Southern Arizona York Refrigeration Company is a proper party and a real party in interest to assert any and all of the aforesaid warranties against third-party defendant, Authorized Supply Company of Arizona.

Further alleges that the cause or causes of action existing against third-party defendant Authorized Supply Company of Arizona for breach of warranties, express and implied, have been assigned and transferred to third-party plaintiff Southern Arizona York Refrigeration Company for a good and valuable consideration, and third-party plaintiff is a proper and real party in interest to assert all said claims or causes of action against third-party defendant, Authorized Supply Company of Arizona.

VIII.

In the alternative, alleges that any and all damage sustained by Swift and Company, as more particularly alleged in the Amended Complaint on file herein, was sustained as a direct and proximate result of the negligence of Authorized Supply Company of Arizona, said negligence arising out of the acts and omissions of said third-party defendant and/or its agents or employees in connection with the improper handling of and/or negligent failure to inspect and discover that said equipment was in a defective and dangerous condition, same being by its nature inherently dangerous to person and property.

IX.

If the Southern Arizona York Refrigeration Company is held responsible or liable to the plaintiff, Swift and Company, said liability and responsibility arose out of the conduct and acts or omissions of the third-party defendant, Authorized Supply Company of Arizona, and the Southern Arizona York Refrigeration Company is entitled to be indemnified for any recovery that may be had against it, together with the expenses of defending this action.

Wherefore, Southern Arizona York Refrigeration Company demands judgment against the third-party defendant, Authorized Supply Company of Arizona, for all the sums that may be adjudged against the Southern Arizona York Refrigeration Company, in favor of the plaintiff, Swift and Company, together with all costs and expenses, including attorneys'

fees, incurred herein, and for such other relief as the Court may deem proper.

Count Two

Comes now Arizona York Refrigeration Company and for its Complaint against Authorized Supply Company of Arizona, an Arizona corporation, third-party defendant, alleges as follows:

I.

Arizona York Refrigeration Company re-alleges each and every allegation contained in paragraphs I, II, III, IV, V, VI and VIII inclusive of Count One of the Second Amended Third-Party Complaint and adopts same by reference as if fully set out herein.

II.

If the Arizona York Refrigeration Company is held responsible or liable to the plaintiff, Swift and Company, said liability and responsibility arose out of the conduct and acts or omissions of the third-party defendant, Authorized Supply Company of Arizona, and the Arizona York Refrigeration Company is entitled to be indemnified for any recovery that may be had against it, together with the expenses of defending this action.

Wherefore, Arizona York Refrigeration Company demands judgment against the third-party defendant, Authorized Supply Company of Arizona for all the sums that may be adjudged against the Arizona York Refrigeration Company, in favor of the plaintiff, Swift and Company, together with all costs

and expenses, including attorney's fees, incurred herein, and for such other relief as the Court may deem proper.

DARNELL, HOLESAPPLE,
McFALL & SPAID,

/s/ By RICHARD C. BRINEY,
Attorneys for Defendants and Third-Party Plaintiffs Southern Arizona York Refrigeration Company and Arizona York Refrigeration Company.

Notice of Mailing Attached.

[Note: Amended Complaint attached hereto is the same as set out at pages 3-6.]

[Endorsed]: Filed March 7, 1958.

[Title of District Court and Cause.]

ANSWER TO THIRD-PARTY COMPLAINT

The Third-Party Defendant, Authorized Supply Company of Arizona, answers the Third-Party Complaint as follows:

Count One

I.

It admits the allegations of Paragraphs I, II, and III.

II.

It denies the allegations of Paragraph IV, except that it admits that the coils referred to were manufactured by Bush Manufacturing Company of West Hartford, Connecticut.

III.

Admits that it knew the purpose for which the coils referred to were intended to be used, and denies every other allegation of Paragraph V; and denies every allegation of Paragraph VI.

IV.

Is without information sufficient to enable it to form a belief as to the truth of the allegations of Paragraph VII, and hence denies them; and denies every allegation of Paragraphs VIII and IX.

V.

Denies every allegation of Count One not expressly admitted.

VI.

States affirmatively that the Third-Party Plaintiffs have hitherto conclusively barred themselves from maintaining this Third-Party Complaint by a binding and executed election of remedies.

VII.

States that Count One pleads no claim against Third-Party Defendant for which relief can be granted.

Count Two

I.

To the extent that matters set out in Count One of the Third-Party Complaint are incorporated by reference in Count Two, Third-Party Defendant adopts his answers to those matters as set out above and incorporates them herein by this reference.

II.

Denies every allegation of Count II, Paragraph II.

III.

States affirmatively that the Third-Party Plaintiffs have hitherto conclusively barred themselves from maintaining this Third-Party Complaint by a binding and executed election of remedies.

IV.

States that Count Two pleads no claim against Third-Party Defendant for which relief may be granted.

MAY, LESHER & DEES,
/s/ By ROBERT O. LESHER,
Attorneys for Third-Party
Defendant.

Notice of Mailing Attached.

[Endorsed]: Filed March 7, 1958.

[Title of District Court and Cause.]

AMENDED ANSWER TO AMENDED
COMPLAINT

Come now the defendants and answer the Amended Complaint on file herein as follows:

I.

Adopt by reference the whole of their Answer to Amended Complaint filed on or about March 3, 1958, including the whole of their First Defense and Second Defense, and incorporate same in this, their

Amended Answer to Amended Complaint, as if same were fully set out herein.

II.

As a further and separate defense to Counts One, Two and Three of plaintiff's Amended Complaint, allege that the plaintiff has heretofore conclusively barred itself from maintaining this action and the Amended Complaint by a binding and executed election of remedies.

DARNELL, HOLESAPPLE,
McFALL & SPAID,

/s/ By RICHARD C. BRINEY,
Attorneys for Defendants.

Notice of Mailing Attached.

[Endorsed]: Filed May 13, 1958.

In The District Court of the United States
For The District of Arizona

MINUTE ENTRY OF FRIDAY, JUNE 6, 1958

May 1958 Term (Tucson Division) At Tucson.

Honorable James A. Walsh, United States District Judge, Presiding.

[Title of Cause.]

This case comes on regularly for pre-trial hearing this day. Richard Evans, Esq., and B. G. Thompson, Jr., Esq., appear for the plaintiff. Richard G. Briney, Esq., appears for the defendants.

Counsel stipulate that the following exhibits may be marked in evidence on trial:

Plaintiff's exhibits 1 to 8, inclusive, defendants' exhibits A to R, inclusive, and third-party defendant's exhibits A to E, inclusive. Plaintiff's exhibit 2 will be admitted without concession by the defendants or third-party defendant that it establishes the proper measure of damages for meat products lost or damaged. Plaintiff's exhibits 6, 7, and 8 will be admitted subject to proof that work, or expenditure, was necessary by ammonia escape.

Counsel stipulate that additional hauling charges cost Swift & Company \$143. plus, subject to proof that it was incurred by reason of a breach of warranty; the same stipulation is made as to \$109. plus handling charged within the plant.

It is stipulated that following the loss, the defendants, or one of them, replaced the two units without charge to Swift & Company.

In The District Court of the United States
For The District of Arizona

MINUTE ENTRY OF TUESDAY,
JUNE 10, 1958

May 1958 Term (Tucson Division) At Tucson.

Honorable James A. Walsh, United States District Judge, Presiding.

[Title of Cause.]

This case comes on regularly for trial this day before the Court sitting without a jury. Richard

Evans, Esq., and B. G. Thompson, Jr., Esq., appear as counsel for the plaintiff; Richard C. Briney, Esq., appears as counsel for the defendants and third-party plaintiffs; and Robert O. Leshner, Esq., appears as counsel for the third-party defendant.

All parties announce ready for trial.

The following exhibits are admitted in evidence with reservations as to certain exhibits as stipulated to at the pre-trial hearing:

Plaintiff's exhibit 1, Articles of Agreement.

Plaintiff's exhibit 2, Tally List.

Plaintiff's exhibit 3, Letter from Swift & Company.

Plaintiff's exhibit 4, Invoices.

Plaintiff's exhibit 5, Invoice.

Plaintiff's exhibit 6, Invoice.

Plaintiff's exhibit 7, Invoice.

Plaintiff's exhibit 8, Invoice.

Defendants' exhibit A, Agreement.

Defendants' exhibit B, Minutes of meeting of Directors.

Defendants' exhibit C, Photograph.

Defendants' exhibit D, Photograph.

Defendants' exhibit E, Photograph.

Defendants' exhibit F, Photograph.

Defendants' exhibit G, Photograph.

Defendants' exhibit H, Photograph.

Defendants' exhibit I, Photograph.

Defendants' exhibit J, Photograph.

Defendants' exhibit K, Photograph.

Defendants' exhibit L, Ledger sheet.

Defendants' exhibit M, Photostat of letter.

Defendants' exhibit N, Photostat of confirmation invoice.

Defendants' exhibit O, Photostat of letter.

Defendants' exhibit P, Photostat of letter.

Defendants' exhibit Q, Letter.

Defendants' exhibit R, Letter.

Third-party defendant's exhibit A, Photostat of invoice.

Third-party defendant's exhibit B, Photostat of invoice.

Third-party defendant's exhibit C, Photostat of letter.

Third-party defendant's exhibit D, Photostat of letter.

Third-party defendant's exhibit E, Photostat of letter.

Plaintiff's Case:

Harry Robertson is sworn and examined on behalf of the plaintiff.

The following plaintiff's exhibits admitted in evidence:

9, Photostatic copy of bid.

10, Photostatic copy of specifications.

The following witnesses are sworn and examined on behalf of the plaintiff:

Frank Rosinski.

Victor James Andrews.

Plaintiff's exhibit 11, Tally of Items, is admitted in evidence.

A. C. Black is sworn and examined on behalf of the plaintiff.

Counsel for the plaintiff moves to dismiss Count 3 of the Complaint.

And thereupon, at 12:00 noon, It Is Ordered that the further trial of this case is continued to 1:30 p.m., this date, to which time all parties and counsel are excused.

Subsequently, at 1:30 p.m., all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Victor James Andrews, heretofore sworn, is recalled and further examined on behalf of the plaintiff.

Plaintiff's exhibit 12, cancelled checks, is admitted in evidence.

Harry Robertson, heretofore sworn, is recalled and further examined on behalf of the plaintiff.

Whereupon, the plaintiff rests.

Richard C. Briney, Esq., counsel for the defendants, moves for judgment in favor of the defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company and against the plaintiff Swift & Company. Said motion is duly argued by respective counsel, and

It Is Ordered that said defendants' motion for judgment is denied.

Defendants' Case:

The following witnesses are sworn and examined on behalf of the defendants:

Maurice D. Gerhart.

Lee Gideon.

Harry Robertson, heretofore sworn, is recalled and further examined on behalf of the defendants.

P. Z. Ray is sworn and examined on behalf of the defendants.

The following defendants' exhibits are admitted in evidence:

S, Deposit Slip.

T, Minutes of Board of Directors dated August 3, 1955.

U, Minutes of Board of Directors dated September 1, 1955.

V, Assignment.

W, Letter.

X, Letter.

Y, Letter.

AA, Waiver of Lien.

AB, Statement.

AC, Statement.

Z, Photostat of letter.

AD, Notes of P. Z. Ray.

Whereupon, the defendants rest.

Robert Leshner, Esq., counsel for the third-party defendant, moves for judgment on the Third-Party Complaint in favor of the third-party defendant, and

It Is Ordered that said Motion is denied.

Counsel for the defendants now moves for judgment for the defendants against the plaintiff, and

It Is Ordered that defendants' motion for judgment is denied.

Thereupon, the third-party defendant rests.

All parties rest.

It Is Ordered that the plaintiff is allowed 15 days in which to file its brief; the defendants are allowed 15 days thereafter to answer and to open as

to the third-party defendant; and the third party defendant is allowed 15 days within which to answer, and 10 days thereafter is allowed all counsel to file their final briefs. Upon the filing of said final briefs, the matter will stand submitted and by the Court taken under advisement.

In The District Court of The United States
For The District of Arizona

MINUTE ENTRY OF THURSDAY,
SEPTEMBER 4, 1958

May 1958 Term (Tucson Division) At Tucson.

Honorable James A. Walsh, United States District Judge, Presiding.

[Title of Cause.]

The Court finds the issues made by the complaint and answers in favor of the plaintiff and against the defendants and concludes that plaintiff is entitled to judgment against defendants in the sum of \$9,175.29; and the Court finds the issues made by the third party complaint and the answers thereto in favor of the third party plaintiff Southern Arizona York Refrigeration Company and against third party defendant and concludes that third party plaintiff Southern Arizona York Refrigeration Company is entitled to judgment over against third party defendant in the sum of \$9,175.29.

Counsel for plaintiff will prepare, serve and lodge proposed findings of fact, conclusions of law and judgment.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 10th day of June, 1958 before the Court sitting without a jury, Boyle, Bilby, Thompson & Shoenhair appearing as counsel for the plaintiff; Darnell, Holesapple, McFall & Spaid appearing as counsel for the defendants and third party plaintiffs Arizona York Refrigeration Company, a corporation and Southern Arizona York Refrigeration Company, a corporation; and May, Leshner and Dees appearing as counsel for third party defendant Authorized Supply Company of Arizona, a corporation.

And the cause being tried on the basis of plaintiff's amended complaint and defendants' amended answer to plaintiff's amended complaint, third party plaintiff's second amended third party complaint and third party defendant's amended answer to third party plaintiff's second amended complaint,

And the Court having heard the testimony and having examined the proofs offered by the respective parties,

And the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

1. Plaintiff is a corporation duly organized and

existing under the laws of the State of Illinois and a citizen of the State of Illinois. Defendants and third party plaintiffs are corporations duly organized and existing under the laws of the State of Arizona and citizens of the State of Arizona. Third party defendant is a corporation duly organized and existing under the laws of the State of Arizona and a citizen of the State of Arizona.

2. The amount in controversy in the above entitled cause exceeds, exclusive of interest and costs, the sum of \$3,000.

3. Prior to May 31, 1955 plaintiff and defendant Arizona York Refrigeration Company entered into negotiations concerning the sale and installation by defendant Arizona York Refrigeration Company to plaintiff of certain refrigeration equipment for use by plaintiff at its plant located at 950 East 17th Street, Tucson, Pima County, Arizona.

4. In the negotiations, plaintiff made known to defendant Arizona York Refrigeration Company the particular purpose for which the refrigeration equipment was required, viz: to refrigerate and freeze meat products stored in plaintiff's plant; and plaintiff relied upon defendant Arizona York Refrigeration Company's recommendation, skill and judgment with respect to the refrigeration equipment to be furnished by said defendant to plaintiff.

5. On or about May 31, 1955, and as a result of such negotiations, plaintiff and defendant Arizona York Refrigeration Company entered into a writ-

ten contract whereunder defendant Arizona York Refrigeration Company, as Contractor, agreed to provide all the materials and to perform all the work for the installation of a complete, fully automatic refrigeration system for plaintiff's plant hereinbefore mentioned; that it is expressly provided in said contract:

"That the design, materials, and workmanship, of the machinery and all parts of the plant furnished and installed by the Contractor, shall be first-class in every respect, and suitable for the purpose intended.

"That all parts furnished by Contractor are to operate and perform their functions properly and prove durable in reasonable service.

"No payment in part or in whole shall be construed as a waiver of any guarantees of this contract."

6. Subsequent to May 31, 1955, defendant Arizona York Refrigeration Company purchased from Third Party Defendant two pieces of refrigeration equipment known as Bush coils. Before purchasing said coils, defendant Arizona York Refrigeration Company made known to Third Party Defendant the particular purposes for which said Bush coils were required, viz: to refrigerate and freeze meat products stored in plaintiff's plant. In purchasing said Bush coils from Third Party Defendant, defendant Arizona York Refrigeration Company relied upon the recommendation, skill and

judgment of Third Party Defendant with respect to said Bush coils.

7. In the negotiations leading up to the making of the contract referred to in Paragraph 5 hereof, and in entering into said contract, both plaintiff and defendant Arizona York Refrigeration Company understood and contemplated that if the refrigeration system covered by their contract failed to operate efficiently and properly, as intended by the parties, loss and damage to meat products stored in plaintiff's plant would be the natural and probable consequence of the failure of such refrigeration system. When defendant Arizona York Refrigeration Company purchased from Third Party Defendant the Bush coils described in Paragraph 6 hereof, both Arizona York Refrigeration Company and Third Party Defendant understood and contemplated that if said Bush coils failed to operate efficiently and properly, as intended by the parties, loss and damage to meat products stored in plaintiff's plant would be the natural and probable consequence of the failure of such coils.

8. Subsequent to May 31, 1955, the defendant Arizona York Refrigeration Company proceeded with the work of installing the refrigeration system in plaintiff's plant, as provided by the contract referred to in Paragraph 5 hereof. On or about September 1, 1955, the defendants entered into an agreement between themselves whereunder, inter alia, defendant Arizona York Refrigeration Company assigned all of its rights under the contract

referred to in Paragraph 5 hereof to defendant Southern Arizona York Refrigeration Company, and Southern Arizona York Refrigeration Company assumed the rights and liabilities of Arizona York Refrigeration Company under said contract. Thereafter Southern Arizona York Refrigeration Company completed the installation of the refrigeration system in plaintiff's plant. The Bush coils referred to hereinbefore were installed as a part of the refrigeration system.

9. On or about December 5, 1955, because of defects in one of the Bush coils furnished plaintiff by defendant Arizona York Refrigeration Company, large quantities of ammonia gas escaped from the refrigeration system in plaintiff's plant and permeated various portions of plaintiff's plant, thereby contaminating and damaging large quantities of plaintiff's meat products stored in the plant.

10. Subsequent to December 5, 1955, Third Party Defendant furnished defendant Southern Arizona York Refrigeration Company with new Bush coils of an improved design to be substituted for the defective Bush coils then installed in plaintiff's plant. Thereafter, defendant Southern Arizona York Refrigeration Company removed the Bush coils originally installed in plaintiff's plant and substituted the new Bush coils in their stead.

11. None of the parties to such substitution arrangements (neither plaintiff, nor Southern Arizona York Refrigeration Company, nor Third Party Defendant), intended by such arrangements to effect

a rescission of any of the agreements between them.

12. By an agreement dated about September 1, 1955 and by assignment dated January 16, 1958, defendant Arizona York Refrigeration Company assigned all of its claims against Third Party Defendant to defendant Southern Arizona York Refrigeration Company.

13. As a direct and proximate result of the ammonia leak from the defective Bush coils plaintiff incurred damages in the sum of \$141.60 for processing and sorting contaminated products; \$320.10 for storage, transportation and handling of meat products during the period required to effect repairs to the defective equipment; and damages for meat products destroyed, less the salvage value determined upon the basis of sales price less the expense which plaintiff would have incurred in selling the meat products had they been marketed in the regular way, being the gross sum of \$9,292.23 less \$578.64 selling expense or a net for the meat products destroyed in the sum of \$8,713.59, making a total damage sustained by plaintiff in the sum of \$9,175.29.

Conclusions of Law

From the foregoing facts, the Court concludes:

1. This Court has jurisdiction of the parties to this action and jurisdiction of the subject matter of this action.

2. Defendant Arizona York Refrigeration Company expressly warranted to plaintiff that the re-

refrigeration system installed in plaintiff's plant was constructed of durable and sound materials and that said system was fit and suitable to safely and efficiently refrigerate and freeze meat products stored by plaintiff in said plant. Defendant Arizona York Refrigeration Company also impliedly warranted to plaintiff that said refrigeration system was reasonably fit and suitable to safely and efficiently refrigerate and freeze meat products stored by plaintiff in its plant.

3. Third Party Defendant impliedly warranted to defendant Arizona York Refrigeration Company that the Bush coils originally furnished by Third Party Defendant to Arizona York Refrigeration Company were reasonably fit and suitable to safely and efficiently carry out their functions as a part of the refrigeration system installed in plaintiff's plant.

4. The defects in the Bush coils which caused the escape of ammonia gas into plaintiff's plant on or about December 5, 1955, constituted a breach of the express and implied warranties mentioned in Paragraph 2 of these Conclusions of Law. The same incident constituted a breach of the implied warranty described in Paragraph 3 of these Conclusions of Law.

5. In permitting the substitution of the new Bush coils in its plant, plaintiff did not thereby elect a remedy for its loss sustained by reason of the breach of the warranties made to it by defendant Arizona York Refrigeration Company. In ac-

cepting the new Bush coils from Third Party Defendant, Southern Arizona York Refrigeration Company did not elect a remedy for its loss sustained by reason of the breach of the implied warranty made to it by Third Party Defendant.

6. Plaintiff is entitled to judgment against defendants Arizona York Refrigeration Company, a corporation and Southern Arizona York Refrigeration Company, a corporation, in the sum of \$9,175.29, together with its costs of suit incurred herein.

7. Third party plaintiff Southern Arizona York Refrigeration Company is entitled to judgment over against Third Party Defendant Authorized Supply Company of Arizona, a corporation, in the sum of \$9,175.29, together with its costs of suit incurred herein.

Dated: September 18, 1958.

/s/ JAMES A. WALSH,
Judge.

Notice of Mailing Attached.

[Endorsed]: Filed September 18, 1958.

In The District Court of the United States
For The District of Arizona

No. Civ. 909-Tuc.

SWIFT AND COMPANY, a corporation,
Plaintiff,

vs.

ARIZONA YORK REFRIGERATION COM-
PANY, a corporation, and SOUTHERN ARI-
ZONA YORK REFRIGERATION COM-
PANY, a corporation,
Defendants and Third Party Plaintiffs,

vs.

AUTHORIZED SUPPLY COMPANY OF ARI-
ZONA, an Arizona corporation,
Third Party Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on the 10th day of June, 1958 before the Court sitting without a jury, Boyle, Bilby, Thompson & Shoenhair appearing as counsel for the plaintiff, Darnell, Holesapple, McFall and Spaid appearing as counsel for the defendants and third party plaintiffs Arizona York Refrigeration Company, a corporation and Southern Arizona York Refrigeration Company, a corporation, and May, Leshner and Dees appearing as counsel for third party defendant Authorized Supply Company of Arizona, a corporation,

And the cause being tried on the basis of plaintiff's amended complaint and defendants' amended

answer to plaintiff's amended complaint, third party plaintiff's second amended third party complaint and third party defendant's amended answer to third party plaintiff's second amended complaint.

And the Court having heard the testimony and having examined the proofs offered by the respective parties,

And the cause having been submitted to the Court for decision, the Court being fully advised in the premises,

Now, Therefore, It Is Ordered, Adjudged and Decreed as follows:

1. That plaintiff be and it is hereby awarded judgment against the defendants Arizona York Refrigeration Company, a corporation, and Southern Arizona York Refrigeration Company, a corporation, in the sum of \$9,175.29, together with its costs of suit incurred herein.

2. That third party plaintiff Southern Arizona York Refrigeration Company, a corporation, be and it is hereby awarded judgment over against third party defendant Authorized Supply Company of Arizona, a corporation, in the sum of \$9,175.29, together with its costs of suit incurred herein.

Done In Open Court this 18th day of September, 1958.

/s/ JAMES A. WALSH,
Judge.

Notice of Mailing Attached.

[Endorsed]: Filed September 18, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Swift and Company and its attorneys, Boyle, Bilby, Thompson and Shoenhair, Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company and their Attorneys, Darnell, Holesapple, McFall & Spaid.

Please take notice that the Third Party Defendant, Authorized Supply Company of Arizona, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the findings of fact, conclusions of law, and judgment against it entered herein on the trial of the action.

MAY, LESHER & DEES,
/s/ By ROBERT O. LESHER,
Attorneys for Third Party
Defendant.

[Endorsed]: Filed October 16, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That Authorized Supply Company of Arizona, an Arizona corporation, being the Third Party Defendant in the above entitled action as Principal, and Hartford Accident and Indemnity Company, authorized and qualified to be and become surety on judicial bonds within the State of Arizona, as surety, are held and firmly bound unto the plaintiff

in the above entitled cause in the sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States, for which payment well and truly to be made, we bind ourselves and our successors, or assigns, jointly and severally, firmly by these presents.

Signed and dated this 15th day of October, 1958.

The Condition of the above obligation is such that, whereas the above named Third Party Defendant did on the 17th day of October, 1958, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered against it in the above entitled action on the 18th day of September, 1958, in favor of the defendants and against said Third Party Defendant, and from the whole thereof

Now Therefore, if the said Authorized Supply Company of Arizona, principal, shall pay all costs which may be adjudged or awarded against it in the appeal, if the appeal is dismissed or the judgment is affirmed or modified then this obligation to be void, otherwise to be and remain in full force and effect.

AUTHORIZED SUPPLY COMPANY OF ARIZONA,

/s/ By ROBERT MAY,
Its Attorney.

[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY,

/s/ By ALLEN [Illegible],
Attorney-in-fact.

[Endorsed]: Filed October 16, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Arizona York Refrigeration Company, a corporation, and Southern Arizona York Refrigeration Company, a corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the findings of fact and conclusions of law, and the final judgment in favor of the plaintiff and against the said defendants, entered in this action on September 18, 1958.

Dated this 17th day of October, 1958.

DARNELL, HOLESAPPLE,
McFALL & SPAID,

/s/ By RICHARD C. BRINEY,
Attorneys for Defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.

[Endorsed]: Filed October 17, 1958.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That we the undersigned jointly and severally acknowledge that we and our personal representatives are jointly bound to pay to Swift and Company, a corporation, plaintiff, the sum of Twelve Thousand and No/100 Dollars (\$12,000.00).

The condition of this bond is that whereas the

defendants have appealed to the Court of Appeals for the Ninth Circuit from the judgment of this court, in favor of the plaintiff and against the defendants Arizona York Refrigeration Company, a corporation, and Southern Arizona York Refrigeration Company, a corporation, entered September 18, 1958, if these defendants shall pay the amount of the final judgment herein if their appeal shall be dismissed or the judgment affirmed or modified together with all costs that may be awarded, then this bond is void, otherwise to be and remain in full force and effect.

Signed and Executed this 17th day of October, 1958.

ARIZONA YORK REFRIGERA-
TION COMPANY, a corporation,
SOUTHERN ARIZONA YORK RE-
FRIGERATION COMPANY, a
corporation,

/s/ By RICHARD C. BRINEY,
Their Attorney,
Principal.

[Seal] FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND,

/s/ By BERNARD J. SERWAITE,
Its Attorney in Fact,
Surety.

Approved this 17th day of October, 1958:

/s/ JAMES A. WALSH,
Judge.

[Endorsed]: Filed October 17, 1958.

[Title of District Court and Cause.]

STIPULATION OF CONTENTS OF RECORD
ON APPEAL

It is hereby stipulated between counsel that the record on appeal, in the appeals of the defendant, Southern Arizona York Refrigeration Company, and of the Third Party Defendant, Authorized Supply Company, shall consist of the following:

1. Amended Complaint.
2. Answer to Amended Complaint.
3. Amended Answer to Amended Complaint.
4. Second Amended Third Party Complaint.
5. Answer to Third Party Complaint, filed on or about March 6, 1958.
6. Findings of Fact and Conclusions of Law.
7. Judgment entered and filed September 18, 1958.
8. Notice of Appeal, filed by Third Party Defendant Authorized Supply Company.
9. Bond on Appeal, filed by Third Party Defendant Authorized Supply Company.
10. Notice of Appeal, filed by defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.
11. Supersedeas Bond, filed by defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.
12. This Stipulation of Contents of Record on Appeal.
13. Transcript of Evidence and proceedings at the trial.

- 14. All minute entries.
- 15. All exhibits in evidence.

Dated this 14th day of November, 1958.

BOYLE, BILBY, THOMPSON &
SHOENHAIR,

/s/ By B. G. THOMPSON, JR.,
Attorneys for plaintiff.

DARNELL, HOLESAPPLE,
McFALL & SPAID,

/s/ By RICHARD C. BRINEY,
Attorneys for defendants and Third
Party Plaintiffs.

MAY, LESHER & DEES,

/s/ By ROBERT O. LESHER,
Attorneys for Third Party
Defendant.

[Endorsed]: Filed November 17, 1958.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of the said Court, including the records in the case of Swift & Company, a corporation, plaintiff, versus Arizona York Refrigeration Company,

a corporation, et al., defendants and third-party plaintiffs, versus Authorized Supply Company of Arizona, an Arizona corporation, third-party defendant, numbered Civil-909 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the City of Tucson, State and District aforesaid.

I further certify that the said original documents, and said copies of the minutes entries, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated in the Stipulation of Contents of Record on Appeal filed therein and made a part of the record attached hereto and the same are as follows, to-wit:

1. Plaintiff's Amended Complaint.
2. Defendants' Answer to Amended Complaint.
3. Defendants' Second Amended Third-Party Complaint.
4. Third-Party Defendant's Answer to Third-Party Complaint.
5. Defendants' Amended Answer to Amended Complaint.
6. Minute entry of June 6, 1958 (pre-trial hearing).

7. Minute entry of June 10, 1958 (proceedings of trial).

8. Plaintiff's original exhibits Nos. 1 to 12, inclusive; defendants' original exhibits A to AD, inclusive; and third-party defendant's original exhibits A to E, inclusive.

9. Minute entry of September 4, 1958.

10. Findings of Fact and Conclusions of Law.

11. Judgment.

12. Third-Party Defendant's Notice of Appeal.

13. Third-Party Defendant's Bond for Costs on Appeal.

14. Defendants' Notice of Appeal.

15. Defendants' Supersedeas Bond.

16. Stipulation of Contents of Record on Appeal.

17. Reporter's Transcript of Evidence and Proceedings at the Trial.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$3.60 and that sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court at Tucson, Arizona, this 28th day of November, 1958.

[Seal] WM. H. LOVELESS,

Clerk,

/s/ By ERMELIA COLE,

Deputy Clerk.

In The District Court of The United States
For The District of Arizona

No. Civ. 909 Tucson

SWIFT & COMPANY, Plaintiff,

vs.

ARIZONA YORK REFRIGERATION COM-
PANY, also known as SOUTHERN ARI-
ZONA YORK REFRIGERATION COM-
PANY,

Defendant and Third Party Plaintiff,

vs.

AUTHORIZED SUPPLY COMPANY OF ARI-
ZONA, an Arizona corporation,
Third Party Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances: Messrs. Boyle, Bilby, Thompson & Shoenhair, By Mr. Richard Evans and Mr. B. G. Thompson, Jr., For the Plaintiff. Messrs. Darnell, Holesapple, McFall & Spaid, By Mr. Richard Briney, For the Defendant and Third Party Plaintiff. Messrs. May, Leshner & Dees, By Mr. Robert Leshner, For the Third Party Defendant. [1]*

The Above Entitled Matter came up for trial on the 10th day of June, 1958, at the hour of 9:30

* Page numbers appearing at top of page of Reporter's Transcript of Record.

o'clock a.m., at Tucson, Arizona, before The Honorable James A. Walsh, Judge, and the following proceedings were had, to-wit:

The Clerk: Civil 909, Swift & Company, Plaintiff versus Arizona York Refrigeration Company, also known as Southern Arizona York Refrigeration Company, Defendant and Third Party Plaintiff, versus Authorized Supply Company of Arizona, an Arizona corporation, Third Party Defendant. For trial.

The Court: Is the plaintiff ready?

Mr. Evans: The plaintiff is ready.

The Court: Defendant ready?

Mr. Briney, Yes, sir.

The Court: The Third Party Defendants ready?

Mr. Leshner: Yes, sir.

The Court: May I have the pre-trial memorandum. Pursuant to the pre-trial, I will direct the Clerk at this time to mark in evidence Plaintiff's Exhibits 1 through 8, inclusive, 2 being admitted without concession by the defendant or third party defendant, that it establishes the proper measure of damages for the meat products lost or damaged; and 6, 7 and 8 being admitted subject to proof that [2] the work or expenditure to which the exhibits are related was rendered necessary by ammonia escape. The Clerk is further directed to mark in evidence at this time Defendant's Exhibits A through R, inclusive; and to mark in evidence Third Party Defendant's Exhibits, Authorized A through Authorized E, inclusive, both of those.

Mr. Evans: I believe too, if the Court please,

that we have a copy of specifications that bear the date February 18, 1955, and have a pencilled notation on the front: "As copy, original bid set before modification." With an initial there, whose I don't know. Mr. Briney has a set of specifications that are dated June 1, 1955. I believe that it would be in order to mark and admit both copies of the specs, so that if there are any substantial changes in them that those will be made apparent to the Court. From a cursory examination or comparison of the two I don't believe there is anything any different in the two of them that has any appreciable bearing on the issues in this case. There are some different types of equipment specified, different capacity and so on. Am I correct, substantially?

Mr. Briney: I confess I have never seen, other than here this morning, Mr. Evans' offer. I do have specifications with attached equipment lists, dated June 1, 1955. It is my understanding they were submitted after the job had been bid and begun. Mr. Evans is correct, just comparing paragraphs, [3] the terms of the specifications appear the same on the two instruments, but I haven't read them word for word. The equipment lists are different to some extent. Subject to adequate foundation from the plaintiff that his exhibit constitutes the specifications under which the job was bid or begun, I would not object to the offer for whatever it might show, and I would be willing to have marked in evidence the specifications marked June 1, 1955. I don't think I could stipulate as to all of the reasons for the change or to what extent the

job was done in detail on each particular set. I would be willing to offer them as such to have them marked.

The Court: Right now you are insisting Mr. Evans lay a foundation, so I guess we might as well take that that way.

Mr. Evans: That is going to be a little difficult to do, because the architect that drafted the specifications is not available. We will have to try to do it another way through either Mr. Robertson or Mr. Ray of the Arizona York Company.

The Court: I don't understand that you have to produce the architect who wrote them.

Mr. Evans: He also is the gentleman who, on behalf of the plaintiff, entered into the contract of which the specifications were made a part.

The Court: My understanding would be a foundation would be somebody who could testify definitely that these are [4] the specifications that were in existence and to which the contract related on the date the bid was made or the work was done. I mean they must be tied to Exhibit 1.

Mr. Evans: Yes.

The Court: But that doesn't have to by the architect.

Mr. Evans: No, I know that. I will have to do it through one of the officers of the defendant. So I guess we might as well get at it. Call Mr. Robertson for cross examination under the Statute.

HARRY ROBERTSON

called as a witness herein, having been first duly sworn, testified as follows:

Cross Examination

Q. (By Mr. Evans): State your name, please.

A. Harry Robertson.

Q. What is your occupation, Mr. Robertson?

A. I am manager of Southern Arizona York.

Q. Calling your attention, Mr. Robertson, to May 31 of 1955, what was your employment at that time?

A. At that time I was manager of Arizona York.

Q. For its Tucson operation?

A. For its Tucson operation. [5]

Q. In connection with your employment by Arizona York in May, 1955, did you have occasion to execute a contract with Swift & Company?

A. Yes, I negotiated that contract.

Q. I hand you Plaintiff's Exhibit 1 in evidence and ask you if that is a copy, true copy of the agreement that was entered into by you on behalf of Arizona York and Swift & Company on or about May 31, 1955?

A. There is no question about the sheets to which I have signed my name.

Q. Is there any question in your mind about the others? A. There is no initials or anything.

Q. Mr. Robertson, I hand you Plaintiff's Exhibit 9, marked for identification, and ask you if that is a true copy of the specifications which were

(Testimony of Harry Robertson.)

referred to in the contract of May 31, 1955, consisting of 10 pages?

A. This is supposed to be the original specifications?

Q. Yes, sir.

A. I will say it is at least similar.

Q. At least similar. Let me ask you this, Mr. Robertson, between the time that you first started negotiating to do this job and the time that the job was actually commenced, there were some modifications or changes made in the specifications, were there not? A. That is correct. [6]

Q. Most of those, if not all of the changes, were in the equipment that was to be used, isn't that also correct?

A. There were some changes in the design also in connection with that.

Q. What I am getting at is, there was no change made in the so-called general conditions that are in the first five or six pages of the specifications?

A. That is correct.

Q. Where the changes came were in the so-called equipment list and in design? A. Yes.

Q. I hand you the Plaintiff's Exhibit 10, marked for identification, and ask you if that is a correct copy of the specifications as modified and in accordance with which the job was done?

A. Yes, that is right.

Q. So that the actual agreement or agreements under which your job was done for Swift & Company consisted of the Plaintiff's Exhibit 1, being

(Testimony of Harry Robertson.)

the original contract, and Plaintiff's Exhibit 10, being the specifications bearing date June 1, 1955?

A. I should state that the original specifications were after we estimated the job and the second set of specifications, I have made no definite word to word comparison of them, but they asked us that we return them based on suggested changes, [7] which were mutually agreed upon, as far as the design and nature of equipment.

Q. Right. But the job definitely did go ahead in accordance with the modified specifications dated June 1, 1955?

A. Other than with revisions as accepted by their superintendent.

Q. As you went along on the job?

A. As we went along.

Mr. Evans: We offer in evidence, if the Court please, Exhibits 9 and 10.

Mr. Briney: I have no objection.

Mr. Leshner: Your Honor, may I address a question to counsel?

The Court: Very well.

Mr. Leshner: It isn't contended, is it, that Authorized Supply had anything to do with the contract of which these specifications are a part?

Mr. Evans: No, sir.

Mr. Leshner: I have no objection.

The Court: 9 and 10 will be received.

(Plaintiff's Exhibits 9 and 10 marked in evidence.)

Mr. Evans: That is all the questions we have, Mr. Robertson. [8]

FRANK ROSINSKI

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Evans): Please state your full name and where you live, Mr. Rosinski.

A. Frank Rosinski, 4815 East 4th.

Q. Here in Tucson?

A. That is right, sir.

Q. What type of employment do you engage in?

A. Superintendent before. I am salesman now.

Q. You are salesman for whom?

A. Swift & Company.

Q. Back in 1955 were you employed by Swift & Company? A. I was.

Q. In what capacity at that time?

A. Superintendent.

Q. Superintendent of what?

A. Of the plant, sales unit.

Q. And the plant is located where?

A. 950 East 17th Street, Tucson, Arizona.

Q. How long have you been in the employ of Swift & Company continuously? [9]

A. Approximately 29 years.

Q. Now, were you the superintendent of this plant which was outfitted by either Arizona York Company or Southern Arizona York Company in 1955? A. Yes, sir, I was.

Q. And do you recall approximately when that job was completed by the York people?

A. No, I don't.

(Testimony of Frank Rosinski.)

Q. Would you generally describe to the Court what the plant consists of, of which you had supervision?

A. Well, I had charge of all operations in the plant, which was the meat cutters, the floor help and the trucks, and the coops.

Q. On the morning, or calling your attention to the morning of December 5th of 1955, did you go to work on that day? A. I did.

Q. Do you recall the approximate time of day you went to work?

A. Approximately at 5:00 a.m.

Q. Do you recall the day of the week that this December 5th was on?

A. It was on a Monday.

Q. Had the plant been in operation over the week-end? A. No, it hadn't. [10]

Q. When had it been closed down as far as employees were concerned?

A. Friday evening.

Q. So there had been nobody working around there between Friday evening and when you got there Monday morning? A. No, there hadn't.

Q. Is that true? A. Yes, sir.

Q. When you arrived at work on the morning of December 5th, what did you find, if anything?

A. On Monday the 5th of December, the four men I had to unload trucks, they came on at 4:00 o'clock in the morning and they in turn have found that the ammonia leak has occurred; they in turn called me at my home at 4815 East 4th and I in

(Testimony of Frank Rosinski.)

turn come to the plant. And after looking over the plant, seeing it was full of ammonia, I called Lee Gidden of the Southern Arizona York, or the Arizona York at that time, I imagine. And while waiting for him I went in with a water saturated handkerchief over my mouth and my nose—I couldn't get to the ammonia mask, which was about five feet from the door. And I tried to open up all the doors to let the ammonia evaporate or escape from the building.

Q. The room you first went into, does it have some kind of descriptive name?

A. Yes, it is the dry storage area. [11]

Q. In that dry storage area or dry storage room, was there any piece of refrigerating equipment?

A. The only thing that was there is the machinery itself, but nothing that was refrigerated in the dry storage area.

Q. Let me show you the Defendant's Exhibit E in evidence, and ask you if that shows a part of the so-called dry storage room?

A. No, this is not the dry storage area.

Q. What area is that?

A. This is the area in the big cooler, which is leading out from the freezer itself. The freezer is to the left of this cooler.

Q. Now, take a look at Defendant's Exhibit J in evidence, and tell us what that is?

A. This is the ammonia condenser coils that are in the freezer itself that refrigerate the freezer room.

(Testimony of Frank Rosinski.)

Q. Is that where the ammonia came from?

A. Well, yes. This is the unit. There are two units in there.

Q. It was either that unit or one identical to it?

A. That is right, sir.

Q. Where was the unit that had leaked the ammonia located, was it in the freezer room or dry storage room?

A. It was in the freezer room.

Q. In the freezer room itself? [12]

A. That is right.

Q. What do you keep in the freezer room?

A. All items of frozen stage that have to be kept frozen at all times.

Q. What does Defendant's Exhibit F show us?

A. This is the storage room for carcass, beef, veal and lamb, and also our cutting operations and area where the orders themselves are put in for delivery.

Q. Will you tell us, Mr. Rosinski, in what areas of the Tuscon plant that morning did you find ammonia fumes?

A. It was through the entire building.

Q. What does the building consist of other than the dry storage unit of the freezer room and of the carcass storage and cutting area?

A. There is the offices. They were quite saturated too, which no one could stay in them either.

Q. In other words, the ammonia had infiltrated—

A. Throughout the entire building.

Q. —throughout the entire building?

A. That is right, sir.

(Testimony of Frank Rosinski.)

Q. How long was it before you were able to get the ammonia cleared out of the building?

A. It has been sometime ago; to the best of my knowledge is possibly was the second or the third day.

Q. Now, with respect to the various meat products, such [13] as your carcasses and frozen foods and so-called dry storage products, were they affected by the ammonia? A. Yes, they were.

Q. What did it become necessary to do?

A. Well, it was necessary to dispose of it at the best price where it could be sold, such as to the tallow company, which no one else was able to buy, because it wasn't fit to be consumed.

Q. That was because of the ammonia that had penetrated into the product?

A. That is right, sir.

Mr. Evans: That is all.

Cross Examination

Q. (By Mr. Briney): Mr. Rosinski, when you went in the building early that morning, you went into where the freezer room was too, did you not?

A. No, I didn't.

Q. When did you first get to the freezer room?

A. I myself, I believe it was the second or third day. I am not sure. After I had made a loan of some ammonia masks from the Fire Department, I believe it was the second or third day before I was able to get in there.

Q. The first morning when you went in, did you

(Testimony of Frank Rosinski.)

[14] observe the condition of the door to the freezer room that opened out to the rest of the building?

A. I did not. I did not get in that far.

Q. When did you first observe the condition of that door?

A. Again I will say the second or third day.

Q. Was the door open or closed when you saw it?

A. I don't remember. I don't remember if it was open or closed.

Q. As a matter of fact, it was wide open, wasn't it? A. I don't know, sir, for sure.

Q. I hand you Defendant's Exhibit 10 in evidence and ask you if that doesn't show the door to the freezer room from the outside?

A. That is right, sir.

Q. Do you think you could come down on the blackboard and for the benefit of the Court show the outside perimeter of the building, show the freezer room in relation to the building, offices and so forth? A. You mean sketch it out?

Q. Could you do that?

A. I am not that good an artist.

Q. I don't want you to be an artist, I want you to show the Court where the freezer room is in relation to the cold storage area and the offices and so forth. Just a line drawing. Explain it as you go. Could you stand to one side [15] a little bit?

A. This is the entrance to the building and down through this area here is the offices. And right through here is the big—this is a chicken cooler here. And right in this corner here, this is the freezer

(Testimony of Frank Rosinski.)

area, this is the cooler space where hanging beef is and this is provisions such as pork and butter and items that are being used in the refrigerated area too. But this right here——

Q. Mark "freezer room".

A. (Witness indicates)

Q. How about the direction, could you put the directions north and south on there?

A. This would be south.

Q. Outside of the building?

A. This would be south of the building.

Q. From what you have marked, you mean freezer there? A. Yes.

Q. That is on the south?

A. South wall. Not entirely to the wall, but about the middle of it.

Q. Would you indicate the cold storage area you referred to originally? A. Cold storage?

Q. Yes. A. This is entire cold storage. [16]

Q. Mark it "cold storage".

What about the offices, Mr. Rosinski?

A. These are the offices here. This is the manager's office.

Q. Mark all of them.

A. And this is salesmen's office and this is the bookkeeper's office.

Q. The other areas you have partitioned off to indicate what they are?

A. This is the poultry cooler.

Q. And the other two areas?

A. This is dry storage.

(Testimony of Frank Rosinski.)

Q. The one other area? A. This here?

Q. Yes.

A. This is still the dry storage. This is wide open all the way through.

Q. Where is the front door of the place?

A. Right here. It is on the northeast corner of the building.

Q. Where in the freezer room were the coils that held the ammonia?

A. They were on the east end of the wall and hanging above it, hanging from above on the east end of the building.

Q. In the freezer room? [17]

A. That is right.

Q. Could you mark where they would be?

A. Right here. There was one about here and the other right about here.

Q. Why don't you mark each of those "coils". I think you said there were some frozen foods stored in the freezer room?

A. All frozen foods are in there.

Q. Roughly what area?

A. The entire area.

Q. The coils are all sealed?

A. That is right.

Q. The hanging meat shown in some of the exhibits was generally placed where?

A. In this cold storage. That was all in this area right here.

Q. Exhibit E in evidence is a picture showing what area?

(Testimony of Frank Rosinski.)

A. This is the back area right here. That would be the north end. That was where we kept our butter and cheese. This was the north wall.

Q. And Exhibit F showing hanging meat, I take it, is also in the cold storage area?

A. That is right, that would take in from about half of the building there to the south.

Q. Were you ever present, Mr. Rosinski, when any tests [18] were made by Southern Arizona York or any of the York people, or any of their insurance adjusters or by Mr. Gearhart? Were you there when the coils were tested?

A. I have. I haven't seen the actual tests, but I was there when they started the tests.

Q. That was about when in relation to the morning you came into the plant?

A. I couldn't say. I don't remember.

Q. Several days or a week?

A. It could be, but I don't remember just when.

Q. You can step back here, Mr. Rosinski.

Calling your attention again to the door of the freezer room, where is the door to the freezer room?

A. That would set right in the center, that would be the door.

Q. Somewhere about here (indicating)?

A. That is right.

Q. That is the door shown in Exhibit D in evidence, right? A. That is right.

Q. Let me ask you again, taking you back a couple of years, what is your recollection of whether

(Testimony of Frank Rosinski.)

that door was open or closed when you first saw it after the leak occurred?

A. As I say, I don't remember whether it was open or closed. It probably might have been open, I don't know. I [19] don't remember that far back.

Q. Tell me if this is true. Isn't it true the door was open about 18 inches, it apparently had been jarred open or loose?

A. At that time I don't know, but we have had, as I recall, some time that it had been the vacuum built up in the cooler has caused the door to open.

Q. It is possible that door was open?

A. I wouldn't say for sure. I don't know, as I said.

Q. If, Mr. Rosinski, the leak had been confined, the ammonia had stayed within the freezer room, you agree, would you not, there would not be damage to meats and products outside the freezer room?

Mr. Evans: We object to that as calling for an opinion, speculative, calling for a conclusion of the witness.

The Court: It hasn't been shown he is qualified.

Q. (By Mr. Briney): In any event, when you got on the premises that morning there was ammonia everywhere and it is possible the door was open at that time to the freezer room?

A. Again I say I don't know. I wasn't in there.

Q. It could be though. Tell me about, was there any rubber flap of any kind at the bottom of the door which prevented the door from making a perfect seal?

(Testimony of Frank Rosinski.)

A. I have never checked that door that close, sir.

Q. Prior to the day or the morning of the trouble, can [20] you tell me whether or not you folks had had any trouble keeping that door closed?

A. I don't remember. Let's see, I don't know for sure. I don't know whether it was before or after, but Lee Gideon called that the door had been opening. I don't know whether it was before that or after, I don't know that, I can't say.

Q. Isn't it true, Mr. Rosinski, that you had had this door come open, and as I understand it, the door swings into the cold storage area?

A. Yes, out.

Q. It opens out from the freezer room?

A. Yes.

Q. You can open the door from inside the freezer room? A. Yes.

Q. What was the method of opening the door, what kind of latch, from the freezer room?

A. You had a handle that you pushed out.

Q. To get in from the outside?

A. You pulled it out, pulled it toward you.

Q. Isn't it true, sir, on at least three other times prior to December 4 and 5, 1955 that this door had opened by itself, hadn't it come open at least three other times, the dates being November 1st, November 18th and November 29 of the same year?

A. I don't remember. It is like I said before, it was [21] before or after, which it is, I can't say. I don't remember that far back. Whenever it

(Testimony of Frank Rosinski.)

occurred I called this Lee Gideon on it, so if that would be the case, it would be a date to that effect.

Q. Who installed the door?

A. I don't know.

Q. Arizona York or Southern Arizona had nothing to do with the installation of the door, did they?

A. I don't know.

Q. You were plant superintendent at the time this occurred?

A. Not when it was being built. I had nothing to do with the building. I was just in charge of the operations of the employees.

Q. Do you know who built the building?

A. Sundt Construction.

Q. Didn't he also put the door in?

A. I don't know.

Q. In the freezer room?

A. I don't know.

Q. What was the difference between this particular door and the type doors you had had other experience with in freezer installations?

A. There again I don't know. The doors we had at the other place were all the same type door. [22]

Q. As this door?

A. I mean they were doors that opened up the same as we have in the plant. I don't know anything different. I don't know anything about refrigerator doors or freezer doors.

Q. Do you remember back on December 9th, 1955, some four days after this occurrence at the Swift plant where Mr. J. Snoke and Mr. Fred

(Testimony of Frank Rosinski.)

Baker, who sits here taking notes, came out and took your statement? A. That is right.

Q. Mr. Snoke asked you questions and Mr. Baker wrote them down? A. That is right.

Q. Let me ask you if these questions were asked at that time and the answers given:

“Question: What machines were those—” The preceding questions deal with your calling Mr. Gideon, your coming in Monday morning at a quarter to 5:00. “—the first thing I did was check the machines in the back.”

“Question: What machines were those?”

“Answer: Compressors. When we seen that wasn’t the case we opened the cooler doors and when it hit us in the face we couldn’t stand it and then got the ammonia masks and tried to get in there and it was too strong to get in there then.

“Question: Who was the one that found the door to the freezer room open? [23]

“Answer: I was.

“Question: It was standing open?”

“Answer: Yes, jarred open, loose.

“Question: How far was it open?”

“Answer: About 18 inches.

“Question: That was the night the whole thing was pushed back?”

“Answer: Yes.

“Question: Could you see the leak?”

“Answer: I couldn’t tell you because I couldn’t get in. We didn’t go in there that morning. That

(Testimony of Frank Rosinski.)

was the second morning we went in to find out in that way.”

Do you remember those questions and your answers to that effect?

A. I remember being questioned, but I don't remember exactly.

Q. You would not disagree that was your statement at that time?

A. If that was the time Mr. Snoke and that, that was probably what I answered, yes, sir.

Q. Let me ask you whether these questions weren't asked and you gave these additional answers:

“Question: When was the first time you knew the door was standing open?

“Answer: We didn't know that until we got in the cooler. [24] That was probably Tuesday morning.

“Question: No other employee had gotten to the door before you got there?

“Answer: No, no one could have.

“Question: No one opened the door?

“Answer: No.”

In regard to the question I asked a little while ago, whether the door opened on prior occasions, let me ask you if you weren't asked these questions and gave these responses at the time Mr. Baker transcribed them:

“Question: Did you ever have any previous trouble with that coil unit before this—” I am

(Testimony of Frank Rosinski.)

wrong, Mr. Rosinski, when I told you those dates those doors were open. Those were other leaks. I am in error when I indicated the door had been open on three other specified occasions.

These questions were asked and did you give these answers:

“Question: Did you ever have any trouble with that door before blowing open, the freeze door, the freeze room door?”

“Answer: It always done that since this blower was in there. I had never seen anything like that happen before.

“Question: It is unusual?”

“Answer: That is right, it is. In this old place we had it but it never opened up for us. Whether or not those four fans in there, I don't know whether that caused it, or what [25] caused it.

“Question: Sundt is the one that built this building?”

“Answer: That is right, sir.”

Do you remember those questions and answers concerning the door? A. Yes, I think I did.

Q. Did you ever notify Sundt you were having trouble with that door?

A. Again I will say I don't remember whether I did or didn't.

Q. Did you call the attention of one Mr. Bessmeyer to the fact the door had been open on prior occasions, had come open by itself?

A. As I say, I don't remember if I did. I probably did call him. I don't remember.

(Testimony of Frank Rosinski.)

Q. As a matter of fact, they had made some readjustments on the door?

A. I don't remember that either.

Q. Even after the trouble on the 4th and 5th of December, 1955, the same thing occurred in regard to the door opening?

A. I don't remember that.

Q. I understand it has been quite awhile. Let me ask you if this question was asked and you gave this answer:

“Question: Did you ever notify him you had trouble with the door? [26]

“Answer: That is right. Sundt was here to install a swinging door in the back of the cooler, which we replaced by Burton, something like that, doors. At the same time I called attention of Mr. Bessmeyer about the door being open, he said he would take care of that. So a man had readjusted it over again but it still done the same thing.”

Would that be the best of your recollection your statement at that time?

A. That is possible.

Q. I take it you don't know what caused that door to come open? A. No, sir, I don't.

Q. The night of the 4th of December or morning of the 5th? A. No, sir, I don't know.

Q. Can you give me any idea in dollars and cents what the value of the products inside the freezer room was at that time?

A. I couldn't say, sir, I had nothing to do with

(Testimony of Frank Rosinski.)

the prices or anything at the time. I wouldn't know anything about it.

Q. You still have the same door on that freezer room? A. Yes, we have.

Q. You haven't replaced the door?

A. No, sir, not to my knowledge. [27]

Q. What, sir, was your relationship, if any, to the contract negotiations between Arizona York and Swift & Company? A. I had none.

Q. Who handled that for Swift?

A. I believe the man—I am not sure. I couldn't say because I don't remember. I had nothing to do with the contract negotiated, I don't know who did that, truthfully.

Q. How about Mr. Christianson?

A. He, as I understand, was the construction superintendent.

Q. Did he live in Tucson or sent in?

A. He was sent in from Chicago.

Q. He was here, I take it, at the time the job was bid and thereafter until when, the conversion was made? A. Yes, I presume so.

Q. He was the one that had dealings with the people that installed the freezing equipment?

A. I think so.

Q. Would you have any personal knowledge, Mr. Rosinski, as to what changes were made in the original plans and specifications or contract during the process the York people installed the refrigeration equipment? A. No, sir.

(Testimony of Frank Rosinski.)

Q. You wouldn't know whether they were orally agreed [28] upon changes, or whether they would be in writing, or what? A. No, sir, I don't.

Q. Do you think Mr. Christianson would be the man that would know the most about that?

A. I don't know that, sir.

Q. You wouldn't have any knowledge about the particular coils called for under the contract being placed in the freezer room, what changes might have been made in them, anything like that?

A. No, sir.

Q. Do you recollect, Mr. Rosinski, at any time in the neighborhood of September 1, 1955, receiving a notification from Southern Arizona York Refrigeration Company that they were taking over the business formerly done or handled by Arizona York Refrigeration Company?

A. No, sir, I didn't.

Q. Could there have been such notification come in at that time and you not see it?

A. Possibly could have been, but I had nothing to do. I did not receive any mail to that effect or anything. It would be the manager or someone.

Q. Who was the manager at the time?

A. Mr. Craig.

Q. He would more than likely be the one that would be familiar? [29]

A. If he received the mail, he would be the one, I don't know.

Q. Do you know anything about any correspondence from your company to Southern Arizona

(Testimony of Frank Rosinski.)

York? A. No, sir.

Q. In connection with this job or completing it, paying for it, or anything like that?

A. No, sir.

Q. You didn't have anything to do with the correspondence on that particular thing?

A. No, sir, I didn't.

Q. Was there any practice of Swift & Company to inspect its plant over week-ends at that period of time? A. Well, not necessarily.

Q. Was there a practice or not?

A. No, it never had been and it wasn't necessary unless it was somebody like myself, if I wanted to go there, which I did sometimes on Sundays. I would go to church and drop down for a minute or so, but that Sunday I did not do it.

Q. Would you know, sir, whether there were service calls during the six or eight months after this leak and the damage occurred, by the York people, Southern Arizona York in connection with the installation?

A. Well, I can't answer that. I don't remember just when it was. There were calls made, but I don't know whether before [30] or after. I know there were several calls made.

Q. Some service done? A. That is right.

Q. Lee Gideon, was he involved in any of that work?

A. I believe Lee was the one taking care of it most of the time.

Q. And he was employed—do you know who he

(Testimony of Frank Rosinski.)

was employed by? A. Yes, Arizona York.

Q. You don't know at what time he would have been employed by Southern Arizona as against Arizona York? A. No, sir, I wouldn't.

Q. In any event, he was the man that had something to do with the job to some extent before December 1st, 1955 when they first started the installation and he was there on some occasions after that time?

A. I don't know just when, but he was there.

Q. Did you see any testing done on the coils in the freezer room after the damage had occurred?

A. The best of my knowledge, I remember somebody coming down there, but who they were, I didn't watch it. I had started to, but I was called away and I didn't finish watching it.

Q. Did they take the coils down to do those tests, either or both coils? [31]

A. They took the one down.

Q. Do you know whether that was the north or south coil? A. I don't remember, sir.

Q. Do you know of your own personal knowledge what the result of the tests was as to what the cause of the leak was, do you know what determination was made at that time?

A. They were saying, but I don't remember now what it was. I can't say for sure, because I don't know the terms of refrigeration.

Q. Did you see any pictures taken at that time, Mr. Rosinski?

A. I don't remember. There were pictures taken,

(Testimony of Frank Rosinski.)

but I don't know whether they were taken of that particular coil or not. I don't know.

Q. Do you know a Red Butler?

A. No, sir, I don't. I don't remember the name. I know there were several people there.

Q. How about Tony Mitchell? Do you know a Tony Mitchell? A. No, sir, I don't.

Q. Do you have any knowledge, Mr. Rosinski, as to what became of the two coils in the freezer room, the ones that were there at the time the leak occurred, do you know what became of them?

A. No, sir, I don't. [32]

Q. Were you present when any installation of other coils was made after that occurrence?

A. I was there and showed them what was there and what they wanted to know, and that was it. I walked away from it. They put in the necessary coils or took out the necessary coils.

Q. This was the latter part of December, 1955?

A. I don't know exactly, but it could have been that date.

Q. Let me ask you if this would refresh your recollection. Isn't it true about December 27th or 28th, 1955, some three weeks after the incident you originally described happened, there were new coils brought in and placed in the position indicated in the diagram in the freezer room?

A. Again I will say I do not remember.

Mr. Briney: No further questions.

Mr. Leshner: No questions.

(Testimony of Frank Rosinski.)

Redirect Examination

Q. (By Mr. Evans): I take it, that prior to this occurrence over the week-end in December, 1955 there had been previous leaks in this same equipment?

A. Yes, there had. And we had a grand opening which we had to have Lee Gideon there all the time we had this grand [33] opening. I don't remember what day it was, but he was there all day long.

Q. Taking care of the leaks in the unit?

A. That is right.

Mr. Evans: That is all.

Recross Examination

Q. (By Mr. Briney): Lee Gideon was present then each time these leaks had occurred, to your knowledge? A. That is right.

Q. He was the man that came out when the call was made to York? A. That is right.

Q. I take it, you don't have any more personal knowledge about the cause of those leaks than you do about the leak in question?

A. No, sir, I do not.

Q. There was no damage done to the Swift products during the time several leaks occurred before December 4th, was there?

A. Not to my knowledge.

Q. They occurred, as a matter of fact, when somebody was at the plant?

A. That is right. [34]

Q. The person noticing the leak immediately

(Testimony of Frank Rosinski.)

contacted York? A. That is right.

Q. Now, did Swift undertake any inspection of its plant over week-ends after it had knowledge there had been three prior leaks?

A. I don't remember now exactly whether there was or not. I can't say that. As I said, several times I went down there, but I didn't go especially just to see if there was any such things as that necessary.

Q. It is probably true, notwithstanding there had been several leaks before December 4th, 1955, no regular practice of checking and inspecting on the condition of the refrigeration system was made over week-ends or holidays, would that be true?

A. I don't remember that.

Mr. Briney: Nothing further.

Mr. Leshar: Nothing, your Honor.

Redirect Examination

Q. (By Mr. Evans): Are you familiar with the dates on which these previous leaks occurred?

A. No, I don't have them, that I remember of.

Mr. Evans: That is all. [35]

VICTOR JAMES ANDREW

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Evans): Will you tell us your full name? A. Victor James Andrew.

Q. What is your occupation?

(Testimony of Victor James Andrew.)

A. I am office manager of Swift & Company of the Tucson Sales Unit.

Q. How long have you been in the employ of Swift & Company?

A. It will be ten years this coming July.

Q. I take it then you were in the employ of Swift & Company in the year 1955?

A. I was.

Q. And were you here in Tucson with Swift & Company in 1955? A. I was.

Q. What was your job at that time?

A. Office manager.

Q. Same job. Can you recall the incident over the weekend in December when the ammonia leak occurred at the plant?

A. I recall coming to work and all the boys were outside [36] and there was a very strong odor of ammonia. We went into our offices; there was two people or one person working with me at the time we went into our offices, and as I recall, you just couldn't work in there, it was so saturated with ammonia. So we went out to his house and worked for that day. I believe it was just that one day.

Q. What was done, if you know, Mr. Andrew, with the various products that were stored in the various areas of the plant which were exposed to the ammonia?

A. They were segregated physically, as I recall.

Q. Segregated physically as to what was contaminated and what was not?

A. Actually I don't recall too well, but I don't

(Testimony of Victor James Andrew.)

believe we could get any good product into the cold storage, I am speaking of now, and of course the product that was in there at the time of the leak had to be segregated and evaluated.

Q. Was there an inventory made of that product?

A. There was a count made, yes, sir.

Q. What was done with the product that was contaminated by the ammonia fumes?

A. A small portion of it was sold at the best price we could get from local jobbers and the rest was given to the bone men—I say given, I think it is half a cent a pound we got for it.

Q. You mean the tallow plant? [37]

A. That is right.

Q. From the inventory that was taken following this incident and the records of the company, did you prepare a tally of the items that had been sold or dumped from this ammonia break and setting up the price of it and the amount of it and coming up with a figure showing the money that was involved as a result of this loss? A. I did.

Q. I am going to hand you the Plaintiff's Exhibit 2, which is in evidence, subject to the objections, or as to relevancy, and ask you to tell us what that exhibit represents, Mr. Andrew?

A. This exhibit represents all merchandise that was damaged by ammonia and either had to be given to the bone man or else sold at a very low price to local jobbers.

Q. All right. Now, where it shows the price on

(Testimony of Victor James Andrew.)

the exhibit, what price is that, what does that represent? A. That is selling price.

Q. Selling price to whom?

A. To the retail customers.

Q. To the retailers?

A. To the retailers.

Q. At our request, Mr. Andrew, have you calculated the difference between the selling price as it appears on Plaintiff's Exhibit 2 and what the cost price of those various [38] items had been to you people? A. I have.

Q. Handing you Plaintiff's Exhibit 11, I ask you first of all, if it is a true copy of Plaintiff's Exhibit 2, as far as the typewritten portions of it are concerned? A. It is.

Q. Now, have you indicated on the Plaintiff's Exhibit 11 the difference between the cost and selling price of this merchandise? A. I have.

Q. Tell us just briefly in your own words how you have done that?

A. I took, each month we make a business statement and we divided our sales down by caption, that is, beef, lamb, pork, et cetera, and the previous month I took our experience on our earnings, which is reflected in per hundredweight figures. For example, beef is a big item, and our earnings as shown by our business statement was 77 cents a hundredweight. And that was the element of profit that I deducted from the previous exhibit, I forget the number.

(Testimony of Victor James Andrew.)

Q. 2. You deducted that from the so-called selling price as shown on the other exhibit?

A. That is right, to arrive at a cost.

Q. You have done that on each of the items shown on the two exhibits? [39]

A. That is right.

Mr. Evans: We offer in evidence Plaintiff's Exhibit 11, if the Court please.

Mr. Leshar: Your Honor, might I ask a question of the witness on voir dire?

The Court: Yes.

Q. (By Mr. Leshar): Calling your attention to Exhibit 11 and the pencilled notation in the amount of \$103.16 on page 2, do I understand from what you have testified that that figure \$103.16 represents what you calculate to be your profit on \$5336.00 worth of beef?

A. That is based on our previous months' earnings on beef, yes, sir.

Q. Do you have any knowledge, sir, of what this beef or what any of this meat actually cost Swift & Company?

A. Why, sure. When you say Swift & Company, what do you mean?

Q. Is your Tucson operation an independent corporation? A. No, sir, it isn't.

Q. I mean by that then, by my question, I mean, do you know what this meat which is listed on here cost the corporation which is called Swift & Company and which is the plaintiff in this lawsuit?

A. No.

(Testimony of Victor James Andrew.)

Mr. Leshner: I will object on the ground it is [40] irrelevant.

Q. (By Mr. Evans): Do those exhibits reflect the cost of the product and the selling price of the product as far as the Tucson Sales Unit of the Swift & Company is concerned? A. It does.

Q. Do each of the various sales units in the different cities operate as an independent operation of the Company? A. That is right.

Q. And keep separate books of account?

A. We account for our own profit and losses.

Q. Only? A. Yes.

Mr. Briney: May I ask a few questions on voir dire?

The Court: Surely.

Q. (By Mr. Briney): The items that are shown on Exhibit 2, Mr. Andrew, can you tell me who sold your company the beef, for instance, listed on the exhibit, what is the name of your seller?

A. Who sold to us?

Q. Yes.

A. Well, the greater majority of this product I would guess came from Denver. They are our principal supplier.

Q. That is Swift & Company?

A. Swift & Company, Denver.

Q. Division Two? [41]

A. Yes. It is in the Swift & Company organization, the plant.

Q. Does Tucson pay Swift in Denver?

A. In a manner of speaking. We are invoiced

(Testimony of Victor James Andrew.)

and we have to pay through accounting. It is book transactions.

Q. And the other items, variety meat, bacon, hams, sausage, butter, et cetera, you buy that also from another division of the Swift & Company, do you? A. Yes, we draw everything in here.

Q. Those divisions from Swift from which you make the purchase also have a mark up figure, do you know, in their operation?

A. I couldn't answer that.

Q. Perhaps to be a little repetitious, would I be correct, sir, that referring to the meat and totals on page 2, for a total weight of 13,397 pounds of beef, Swift & Company, Tucson, had a mark up of a total of \$103.16 with regard to its sales of this material to retail outlets?

The Court: What do you mean by mark up?

Mr. Briney: Profit.

A. Well, there is a lot of things to consider in that. For example, there is a shrink factor. Maybe you have held the beef three or four days more than you normally should have. That cuts into your earnings. Maybe the market dropped on a particular cut. There is no fixed margin that you can set [42] up. You have to do the best you can. Sometimes you fare better, sometimes you fare less.

Q. Let's take the first item under beef: S.P.?

A. Sweet pickled tongue.

Q. The retail price listed is 35½¢ a pound, is that right? A. Yes.

(Testimony of Victor James Andrew.)

Q. What did you pay the supplier to you for that product per pound?

A. I would be just guessing.

Q. What guess would you give me?

A. I would say on that particular item about 4 cents a pound. That draws a pretty good profit. You see, that comes in and is sold just as it is, it isn't cut or processed or anything.

Q. What is the 4 cents you are guessing there, you mean you paid $31\frac{1}{2}$ per pound and going to sell it for $35\frac{1}{2}$?

A. That is what I would guess, yes.

Q. You would get quite a different figure on cost, if you multiplied that by pounds on each of these items?

A. You are just picking the one item.

Q. That is right.

A. That is sweet pickled tongue. The preponderance of this list is carcass beef, cut beef.

Q. Let me take you down to one item—I am getting [43] into cross examination.

The Court: I think you are, Mr. Briney.

Mr. Briney: I will object to the offer, absolutely no foundation. It is immaterial.

The Court: May I see it, please? May I see both of them?

The objection will be overruled. It will be received as 11 in evidence.

(Plaintiff's Exhibit 11 marked in evidence.)

Q. (By Mr. Evans): Mr. Andrew, in addition to the damage that was done to these various meat

(Testimony of Victor James Andrew.)

products which you have itemized on the exhibits, was there any damage done to the building itself as a result of this ammonia leak of December 5, 1955?

A. As I understand it, the walls in the freezer room were contaminated with ammonia and as a result they broke down.

Q. And as a result of the walls breaking down, was there additional repair work that had to be performed to put the walls back in condition?

A. Yes, there was.

Q. I hand you Plaintiff's Exhibit 6, and ask you tell us what that represents?

A. Well, I am not too familiar with this stuff, but it was used in the refinishing of the freezer room. [44]

Q. Refinishing a room that had been damaged by the——

A. Ammonia, yes.

Q. That was some material that was used by the contractor that finally did the job?

A. Correct.

Q. Looking here at Plaintiff's Exhibit 7, tell me if that is the repair bill for the contractor that actually did the repair work?

A. It is.

Q. And looking at No. 8, Plaintiff's Exhibit 8, I ask you if those are invoices covering the storage charges of meat products at Arizona Ice & Cold Storage during the time the repairs were being made on the freezer room?

A. It is.

Mr. Evans: We offer in evidence 6, 7 and 8.

The Court: Those are already in, Mr. Evans.

(Testimony of Victor James Andrew.)

Mr. Evans: I thought those were some they had raised objection to.

The Court: No, they are already admitted subject to the showing of necessity for the expenditure.

Mr. Evans: I misunderstood. If my memory was correct that 3, 4 and 5, there was no objection to those and no necessity for additional foundation, is that correct?

Mr. Leshner: That was my understanding. [45]

The Court: We will take the morning recess at this time.

(Recess.)

(After Recess.)

Mr. Evans: Am I correct in my presumption that at the pre-trial it was charges for hauling and handling during the repairs to the freezer were agreed to, 138.12 and 109.21?

The Court: With the reservations that I announced when we first started this morning, those were the only reservations that I knew were made about any exhibit that was marked.

Mr. Evans: We have no further questions of Mr. Andrew.

Cross Examination

Q. (By Mr. Briney): Mr. Andrew, do you know a Mr. Barrett of Barrett & Holmes?

A. No, sir, I don't.

Q. Do you remember who did the original equipment rooms, who did the original finishing of the walls in the cold storage room and so forth? Would

(Testimony of Victor James Andrew.)

that have been Barrett & Holmes, the subcontractors, do you know?

A. The name is familiar, yes, sir. I wouldn't say it [46] would be, but the name is familiar.

Q. Had you observed any flaking of the finish on the walls on any of the interior walls of that building prior to December 4th, 1955?

A. No, sir.

Q. Never saw any flaking of those walls?

A. No, sir. You are talking about the freezer walls?

Q. Do I understand, sir, the materials you referred to here and the work that was done was inside the freezer room? A. Yes.

Q. Inside the freezer room did you observe, before December 4th, 1955, any flaking or breaking down of those walls? A. No, sir.

Q. Now answer me this one, from whom did Swift & Company purchase the original purchase from some person other than a Swift organization the various items listed on the tally of items marked Plaintiff's Exhibit 11, for instance? Where was the original sale and purchase?

The Court: You have asked him where other than from other Swift organizations?

Q. (By Mr. Briney): Yes. When did Swift & Company, the plaintiff in this case, first get title to the items listed on that tally?

A. Most of it I suppose would be in the stockyards. [47]

Q. You wouldn't have any idea as to any partic-

(Testimony of Victor James Andrew.)

ular item on that exhibit, where the purchase was made, from whom the purchase was made by Swift & Company?

A. I would guess at Denver, the Denver stock-yards.

Q. How many Swift organizations had a hand in buying and selling after the original purchase by Swift? Do you see what I mean? You people, I understand, bought this material, a lot of it from the Denver Swift & Company? A. Yes.

Q. It is all the same corporation? A. Yes.

Q. Where would Denver get it?

A. They would buy it from the farmers.

Q. They would buy from the original producer?

A. Yes.

Q. After it purchased it at a certain price it would sell to you and perhaps other Swift Sales Divisions at other locations, right?

A. That is right.

Q. I believe you told us you don't know what might have originally been paid by Swift at Denver to the producer? A. No.

Q. The figure you have attempted to give us there in pencil as to the profit of the Tucson Division, does not include, does not reflect the difference between the cost [48] to Denver Swift of any of those items, does it, doesn't reflect that at all?

A. Not necessarily, no.

Q. In fact, you have determined the pencilled figure from some average of what your earnings were during a particular month as to a particular

(Testimony of Victor James Andrew.)

class of product? A. Yes.

Q. The fact of it is, there were two mark ups, that is, Denver sold to you at a higher figure, at a certain figure that was higher than its cost, wouldn't that follow? A. Not necessarily.

Q. It might be, as to any of the items?

A. They could have sold it at a loss.

Q. Some of them they probably sold them at a profit? A. Either way.

Q. Right? A. Either way, yes.

Q. On some of the items there may have been a loss when Denver sold to you from what they originally paid for it and the others there might have been a profit? A. True.

Q. So what the plaintiff in this case, Swift & Company's profit was by the pound on any of the items listed on Exhibit 11, you do not know?

A. The actual original cost? [49]

Q. I want to know Swift & Company's total profit per pound on any item listed on the tally.

A. I don't know that.

Q. Nor do you know Swift & Company's cost on any of the items listed by pound on the exhibit, do you? A. No.

Q. I take it these retail selling prices shown on Exhibits 2 and 11 were the prices fixed at somewhat a speculative basis, that is, if a material left your Tucson plant a week from the day this accident happened, if it hadn't occurred, that price might change, depending on the market, right?

A. Right.

(Testimony of Victor James Andrew.)

Q. It might be higher, it might be lower at the day it is sold to El Rancho, for instance?

A. Right.

Q. That would be equally true as to all of the items on the exhibits, wouldn't it?

A. Correct.

Q. How long had the Tucson Division been in business as of December 4, 1955?

A. I don't know exactly. It goes back to the turn of the century, I believe.

Q. I am not making myself clear. How long had the particular operation on 17th Street been in operation? [50]

A. I see. We moved over the Labor Day of '55.

Q. That would be in the neighborhood of September 2nd? A. First part of September.

Q. So you had been in a wholesale selling business for maybe three months at the time the loss occurred? A. Correct.

Q. Do you have any personal knowledge, Mr. Andrew, about the contractual relationships between Swift & Company and Arizona York or Southern Arizona York in connection with the refrigeration installed? A. No, sir, I don't.

Q. Do you have any personal knowledge of your own as to the cause of the ammonia leaks?

A. No, sir.

Q. Did you see any testing done or observe any testing done as to the cause? A. No, sir.

Q. Are you familiar with any of the details as

(Testimony of Victor James Andrew.)

to payments made from Swift to Arizona York or Southern Arizona York on the contract?

A. I drew the checks, but as to the details, I wouldn't feel qualified to discuss it, because we had an engineer, construction man here, and he approved the voucher. All I did was merely write the check.

Q. He was on the job, he told you what to do and you [51] did it? A. Yes.

Q. Who is he? A. Mr. Christianson.

Q. Do you know where he is now?

A. No, I understand he is retired. But I don't know where he is.

Q. And the other man in the office there in charge, his name was Craig, as I understand it?

A. Correct.

Q. I hand you Plaintiff's Exhibit 4 in evidence and ask you to look at the signatures on the back of the articles of agreement. You notice Swift & Company, on a signature E. A. Sheweiss?

A. Yes.

Q. And the initials H. C.? A. Yes.

Q. Do you know what the initials H. C. mean?

A. That is Mr. Christianson's initials underneath Sheweiss.

Q. In other words, Harold was Christianson's first name?

A. I think so. I always called him Chris.

Q. Those are his initials, H. C.?

A. I feel positive they are.

Q. Are you familiar with his handwriting? [52]

(Testimony of Victor James Andrew.)

A. Yes.

Q. That is his handwriting. E. A. Sheweiss is Christianson's handwriting, isn't it? A. Yes.

Q. Who is Sheweiss?

A. He is the head of the construction department of Swift & Company.

Q. Was he here at some time or other during construction of this new plant?

A. Not that I know of.

Q. Do you have any personal knowledge, Mr. Andrew, about the door to the freezer room that I have asked Mr. Rosinski about, as for example, do you know whether immediately after the trouble on the 4th and 5th of December, 1955, whether the door to the freezer room was open or closed?

A. I have no knowledge, or I don't recall discussing that particular part of it, but I imagine it would have been open.

Q. Do you have any personal knowledge as to any prior times when that door came open without anybody opening it?

A. Yes. I don't know about prior, but we had some difficulty with the door. It seems when the blower units would go on the doors would blast open by the pressure and the temperature within.

Q. Did you ever have any negotiation with Sundt [53] Construction Company as to altering, changing or adjusting that door? A. No, sir.

Q. Did you ever write any checks to pay them for work done in that regard?

(Testimony of Victor James Andrew.)

A. No, I don't recall any. I don't recall any work done on that door.

Q. Do you have any personal knowledge, Mr. Andrew, about whether the particular coils that were hanging from the ceiling in the freezer room on the dates I mentioned, whether they were replaced and other coils substituted at any subsequent time? A. I didn't understand the question.

Q. Do you know whether the coils in the freezer room the day of the difficulty, December 5th, 1955, do you know whether they were subsequently taken out and replaced by other coils at a later date?

A. I believe the Southern Arizona York people replaced them.

Q. They were put in and installed around the 27th and 28th of December, 1955, would that be about right, sir? A. Yes.

Q. Lee Gideon, did you happen to know him?

A. Yes.

Q. He was involved at the time the replacement was done? [54]

A. I would imagine. He was always there when there was difficulty.

Q. Wasn't he there at the times after the end of December, '55, sometime during 1956, wasn't he on the premises on service calls in connection with the refrigeration equipment?

A. I am quite sure he was.

Mr. Briney: I have nothing further.

Cross Examination

Q. (By Mr. Leshner): Mr. Andrew, calling your

(Testimony of Victor James Andrew.)

attention to the line drawing on the blackboard which was done first by Mr. Rosinski, can you recognize that as being substantially a rough line drawing of the Swift premises?

A. I think the freezer is a little off there.

Q. If you were to change it, where would you put it? A. I would center it more.

Q. Would you come down then and using dotted lines, indicate where you would put the freezer. Don't erase or disturb the present drawing any more than you have to.

A. It was more or less centrally located there (indicating).

Q. I see. So that the dotted area that you have drawn is where you think the freezer was at the time. Aside from [55] that can you orient yourself with that line drawing, does it appear to you to be substantially correct, although rough?

A. I tried to center it on there, yes.

Q. Do you know where the meat that is listed, the meat and meat products and various other items that are listed on Exhibit 11, do you know where they were located at the time they incurred the damage you complain about?

A. They were in the cold storage area and right outside the freezer there.

Q. All of the items that you have listed in Exhibit 11 were outside the freezer room proper, were they not? A. Many of the items, yes.

Q. Were there any of the items that are listed on Exhibit 11 that were not outside the freezer

(Testimony of Victor James Andrew.)

proper? A. Yes.

Q. Do you know which of the items on Exhibit 11 were inside the freezer, if any?

A. I can pick out a few.

Q. How many such items are there on Exhibit 11?

A. This is 11, I guess. Yes. There is 3200 pounds of veal rolls, that is frozen. I will pick the big items. There is a lot of small 20 and 30 pound items. There is 2450 pounds of spare ribs—make that 2500 pounds. There is 175 pounds of frozen pork tenders. There is 1524 pounds of various, what we call variety meats, the offal of the [56] animal. And Brookfield sausage, I am not sure, the superintendent can tell you about that. Sometimes they freeze that item. There was 1,080 pounds of Brown and Serve, which is a very expensive item. And I know some of these poultry items were in the freezer. There is frozen fowl, there is almost 1,000 pounds of that.

Q. Substantially all of the other items on the list, which is on Exhibit 11, were stored outside the freezer room proper, is that correct, sir?

A. There was quite a bit inside the freezer.

Q. Those items you have listed?

A. Yes, sir.

Q. But the great bulk of the meat and food products that were destroyed or damaged were outside the freezer, is that right? A. Yes.

Q. Do you know at what temperature the freezer room was kept?

(Testimony of Victor James Andrew.)

A. At what temperatures it should be kept?

Q. Yes. A. No.

Q. Do you know at what temperature the so-called cold storage area was kept?

A. I think around 34 degrees.

Q. In any event, the freezer room is much colder than [57] the cold storage area?

A. Be around zero.

Q. Meat products kept in the freezer room stay frozen solid? A. Definitely.

Q. And the door to the freezer room is a large heavy refrigerator type door? A. Yes, sir.

Q. In essence, isn't it true that this so-called freezer room is a large walk-in refrigerator, freezer unit? A. That is what it is.

Q. Just like you would have in your home, in your kitchen, only much larger? A. Yes, sir.

Q. You could keep frozen products of all kinds inside of it and they would stay frozen?

A. That is correct.

Q. You said on direct examination, sir, that you understood that the walls in the freezer room, and I believe your expression was, "broken down" as a result of exposure to ammonia. From whom did you derive that understanding?

A. I don't recall.

Q. Are you yourself any kind of an expert on walls? A. No, sir, I am definitely not.

Q. Is it correct that you yourself do not have any [58] first-hand personal knowledge of what

(Testimony of Victor James Andrew.)

caused the walls to break down, is that a true statement?

A. I presumed it to be the ammonia. I mean, they all started to peel; it was after the ammonia break. It is like adding one and one together to me.

Q. The walls began to peel after the ammonia escape, so you assumed the ammonia caused the walls to peel? A. I did.

Q. But you have no actual knowledge based on your own past experience as an expert in the field to know what caused the walls to break down, do you, sir? A. No.

Q. Where are the blowers located that you referred to as having caused the freezer door to come open before this incident?

A. They are directly opposite the door. You can see them there on the diagram. I don't know whether they are in the coils, but in that general area where the coils are and blow out at the door.

Q. Are they part of the coil unit?

A. I am not an authority on that.

Q. They are inside the freezer room some place?

A. They are, yes, sir.

Mr. Leshner: I have nothing further. [59]

Redirect Examination

Q. (By Mr. Evans): Just to clear something up here, at least in my mind. Looking here at Plaintiff's Exhibit 11, you didn't acquire, for example 3.4 pounds of choice top sirloin steaks as top

(Testimony of Victor James Andrew.)

sirloin steaks from Denver, did you? A. No.

Q. In other words, you get it by the carcass?

A. That is right.

Q. Then cut it up here in Tucson?

A. That is right.

Q. At your plant? A. That is right.

Q. That is true with almost all these beef products, the lamb, the veal and the pork?

A. Not the pork, but the beef, lamb and veal is broken here at the unit.

Q. You of course are able, or rather in your operation at Tucson, keep track of the cost of taking that meat from the carcass form and getting it into steaks and chops and hamburger and so on, do you not?

A. We render profit and loss statements each month.

Q. You have employees that are paid salaries and have trucks that are operated to distribute this product, and so on? [60] A. Right.

Q. You have taken those into consideration in arriving at these profits or margin of profit that you have indicated on No. 11? A. That is correct.

Q. Am I correct that the York Company, either Arizona York or Southern Arizona, which ever it may be, also furnished and installed these blower units that set in the freezer room and blow toward the door, that was part of the job done by one of the two York companies, wasn't it?

A. Yes, that is right.

Q. In other words, they did all the refrigeration

(Testimony of Victor James Andrew.)

work there at the Tucson plant and included in it was furnishing and installation of these blower units, true? A. I believe so, yes, sir.

Q. After they were installed they were all put into so-called running condition by people from the York Company, either this Mr. Gideon——

A. Lee Gideon.

Q. Or other people? A. Yes.

Q. As a matter of fact, Mr. Gideon was around there quite a bit adjusting things and checking things after the installation was completed, is that true? A. Yes. [61]

Mr. Evans: That is all.

Recross Examination

Q. (By Mr. Briney): Mr. Andrew, this Exhibit 11, when you calculated a profit on all the first class of items, beef, 13,000 some pounds of beef, you calculated a profit of Swift on that, or your division profit was \$103.16? A. Yes.

Q. What did you pay the butcher that cut up that meat per week?

A. What did we pay him?

Q. What was his salary per week?

A. At that time I guess it was about 85 a week.

Q. So he was getting 300 and what, 50 dollars a month to slice up these carcasses?

A. Yes, sir.

Q. In a month he would get two times as much as the total profit shown on the beef?

A. No. You have that wrong. That profit in-

(Testimony of Victor James Andrew.)

cludes the labor charges. That is a direct charge against the merchandise. These butchers, when they stick a knife into a piece of meat, that is a part of the cost of the meat; wrapping is a part of the cost.

Q. You add those to what you pay Denver? [62]

A. Definitely.

Q. It is bookkeeping entry, no money changes hands?

A. As far as Denver is concerned, no.

Q. After you add all the salaries, costs and packaging then you compute a figure which for that first class you figured 100 and some dollars for 13,000 pounds of beef, is that right?

A. That is right.

Q. Does the cost figure that you use to compute your profit also include your salary?

A. No. My salary is considered an expense. It is not the cost on merchandise. The butchers' salary is the cost on merchandise.

Q. How many other salaries in the Tucson division at around the time December 4th and 5th, 1955 were treated as expenses and not costs?

A. Well, it is just the butchers' salaries that are treated as costs added to the price.

Q. You would have what other people?

A. Sales personnel, delivery and accounting, those are expense items.

Q. They are not charged directly on the products? A. They are not.

Q. The salaries of those folks, I take it, are

(Testimony of Victor James Andrew.)

paid out of—the payroll comes from where, some other Swift & Company? [63]

A. No, we make our own payroll. I would like to mention that Swift & Company's earnings are available, they are public. Each years they make less than—they make a fraction of a cent on a dollar's sales. And the gross margins I show here are about 2% for beef. We have an enormous turn over, that is what makes it add up.

Q. Do you know anything about the Company's stock dividends during the year 1955?

Mr. Evans: I object to that as being immaterial.

The Court: Objection sustained.

Mr. Briney: No further questions.

Redirect Examination

Q. (By Mr. Evans): Approximately how many pounds of beef do you process through this plant every month?

A. This last month was a rather poor month; we did close to 600,000 pounds. The previous month we did about three-quarters of a million.

Mr. Evans: That is all.

Examination

Q. (By the Court): Mr. Andrew, just a minute. This Exhibit 2 has a list of all the meat products, or a lot of meat products that were [64] in the plant on December 5th? A. Yes, sir.

Q. And you have the sales price, that is the price you would have gotten if you would have sold

(Testimony of Victor James Andrew.)

those products in the regular course of business?

A. Yes, sir.

Q. Would there have been any expense in connection with getting that price, any further expense, I mean, if you had sold those in the regular course of business on the 5th, 6th or 7th, would you have had any additional expense to get that price delivery, sales, accounting?

A. Yes, your Honor, there would be.

Q. Could you calculate with reasonable certainty the amount of that additional expense—I don't mean right now.

A. I believe I could.

Q. Would you do that for us, calculate the things that would have come out of that sales price as expense if this accident hadn't happened and you would have made the sales?

A. Your Honor, it might be difficult because of the time element involved. In other words, you have your expenses each day, how long would it take to sell this.

Q. Do you have delivery costs calculated on the basis of dollar sales?

A. We have it on the basis of weight. I suppose we could get it on the basis of weight. [65]

Q. See what you can do with it if you will.

A. All right, sir.

The Court: Do you have copies of that, Mr. Evans?

Mr. Evans: No, I believe those are the only two we have.

The Court: As long as you keep the exhibit in

(Testimony of Victor James Andrew.)

the courtroom, don't take it away with you. You can sit down there in the jury box and make what computations you want or memoranda you want there.

All right, Mr. Evans.

A. C. BLACK

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Evans): State your name, please, sir. A. A. C. Black.

Q. Where do you live, Mr. Black?

A. I live in Amarillo, Texas.

Q. Are you employed at the present time?

A. No, I am not.

Q. What has been your work prior to now?

A. I have been in the construction department.

Q. Of what company?

A. Swift & Company, Chicago.

Q. For how long were you employed by Swift & Company? A. Approximately 42 years.

Q. Have you retired now?

A. That is correct.

Q. During the time you were with the Company, what were your general duties?

A. Well, I remodeled plants and installed equipment and, in fact, built them and equipped them and remodeled them all over the United States and some of the foreign countries.

(Testimony of A. C. Black.)

Q. Were you still in the employ of the Company in December, 1955, Mr. Black?

A. Well, I was at that time in El Paso, at the time of this leakage.

Q. Did you come over to Tucson after being advised of this ammonia break or leak problem, whatever it was?

A. That is right.

Q. Do you recall how long after the leak was discovered that you arrived here?

A. Tuesday afternoon, I think.

Q. The following afternoon?

A. Yes.

Q. Can you tell us what you found when you went out to the plant? [67]

A. Everything contaminated with ammonia.

Q. Was there still ammonia in the various rooms of the building?

A. Quite a bit of it. A lot of it had evaporated due to the doors being open.

Q. Did you make an inspection of the equipment there to try to find out what had caused this ammonia to get out into the various rooms?

A. Yes, we did.

Q. Will you tell the Court what you discovered in making that investigation?

A. It was a small break in an ammonia tube in the freezing suspended unit.

Q. That is what is referred to sometimes as Busch unit?

A. Yes, Busch freezing unit, suspended freezing unit.

(Testimony of A. C. Black.)

Q. Did the Defendant's exhibit J show one of those Busch suspended units?

A. That is correct.

Q. That is one of them, is it? There were two of them in the particular freezing room?

A. There were two in the room.

Q. Can you see on any of these photographs, Mr. Black, where this leak had occurred?

A. I can't identify the exact location. However, it was at the end, I believe of the two. [68]

Q. At the end of the two. Who was there along with you when you were looking this equipment over?

A. Mr. Robertson and myself.

Q. Mr. Robertson from the York Company, is that right?

A. That is correct.

Q. Had he already learned what had caused this thing to happen, or were the two of you there together—

A. No, he had already been over prior to my coming into Tucson.

Q. He, of course, was the manager of the Company?

A. That is right.

Q. Of the Arizona York Company or Southern Arizona?

A. That is right.

Q. Did you have a conversation with him there on that occasion that had anything to do with what had happened to the machine?

A. Yes.

Q. Was there anyone present besides the two of you?

A. I think Frank—what is his name, the superintendent at that time?

(Testimony of A. C. Black.)

Q. Rosinski?

A. Yes. I believe Frank was there.

Q. The three of you? A. Yes.

Q. Was that the same day you had arrived in town? [69]

A. That was Wednesday morning.

Q. The next morning? A. Yes.

Q. Will you relate the conversation you had with Mr. Robertson at the plant on that morning, that would be December 7th, I guess?

A. As I remember, Mr. Robertson and I looked at the defective equipment and I believe the conversation was that the York people would replace the unit free of charge, which I understand they did.

Q. Was there anything else said, anything about the damage to this product or anything of that nature in your conversation?

A. Well, at the same time during the conversation, as well as I remember, to my best recollection, was that Mr. Robertson made the statement that they would, their insurance company would pay for the damaged products.

Mr. Briney: Excuse me. I object to that and ask it be stricken as not responsive, immaterial and irrelevant.

The Court: The motion is denied. Objection overruled.

Q. (By Mr. Evans): Can you explain to us a little bit, Mr. Black, about these so-called blower units that are located in the freezer room?

(Testimony of A. C. Black.)

A. That particular unit I am not particularly familiar [70] with.

Q. You did observe the one that is located there?

A. That is right.

Q. What is the purpose of that, what does it do?

A. That is the mechanism that creates the refrigeration in the room.

Q. Are they big fans?

A. Yes, they have two large fans in the back and the fans blow the air directly through the tubing, which is refrigerated, and blow the air into the room.

Q. In other words, the blowers set in behind this thing? A. They are in the back.

Q. I guess this is the front? A. Yes.

Q. Sit back there and blow through?

A. Blow through. Simple.

Q. Are those blower units regulated in some manner or are they capable of being regulated?

A. That is right.

Q. What is the purpose of the regulation?

A. That is to get more temperature or less, the required temperature.

Q. You have heard the testimony here I believe, Mr. Black, or it has been mentioned to you, at least, that that cooler door or freezer door on the morning that this condition [71] was discovered was apparently open? A. Yes, sir.

Q. And from your examination of the freezer room, of the door and the blowers we had in there, can you tell us what caused that door to come open?

(Testimony of A. C. Black.)

A. Not positive,—

Mr. Briney: I object to that without some foundation. There is no showing this gentleman saw the door in any particular position or any particular time, made any investigation of the condition that existed. Nobody was there probably at the time it occurred, couldn't duplicate the condition.

The Court: I don't think sufficient foundation has been laid.

Q. (By Mr. Evans): On the occasion of your visit following the discovery of this condition, Mr. Black, did you attempt, make any effort to discover what, if anything, had caused that freezer room door to come open?

A. No, I didn't. In fact, I didn't know it existed, that trouble.

Q. You didn't know that had been open?

A. No.

Q. Okay. When this ammonia comes out of these coils, if it is confined into one room, is there a resulting increase in pressure within that room from the presence of [72] the ammonia?

A. Certainly.

Mr. Briney: I object, no foundation.

The Witness: Certainly.

Mr. Briney: No foundation at all.

Q. (By Mr. Evans): Let's go back. Mr. Black, tell the Court the training and experience you have had in working around refrigerating equipment and specifically the general type of refrigerating equipment that is installed in this Tucson unit and in

(Testimony of A. C. Black.)

buildings similar to the Tucson unit, can you do that? A. There is no difference.

Q. Tell us the experience you have had, just how much—you have been doing that for how long?

A. I have been in that end of it 32 years.

Q. 32 years? A. That is right.

Q. During that time have you had occasion to study and to observe the methods for refrigerating these kind of units? A. That is correct.

Q. Have you had occasion to study and learn and observe the effect from a great concentration of ammonia in any one room?

A. That is right.

Q. From your experience and your observations, can you [73] tell us what happens when you get an escape of a large quantity of ammonia into a closed room, as far as the pressure created in that room by the escaping ammonia?

Mr. Leshner: Your Honor, we again object on the ground there is no proper foundation laid. I wonder if I might have leave to ask a question or two on voir dire?

The Court: You may ask it.

Q. (By Mr. Leshner): Sir, do you know the pounds per square inch of pressure required to open the door in this freezer from the inside when it is closed? A. I would say about 15 pounds.

Q. You are familiar with it?

A. It isn't positive that much, but approximately.

Q. Have you ever run a test?

(Testimony of A. C. Black.)

A. Not exactly, but by pushing on the handle by hand pressure you can very well determine about how much pressure you are applying to open the door.

Q. You have never made a test to determine how much gas pressure, for example, is required to open the door?

A. It wouldn't take any more than your hand if you open it.

Q. My question, sir, you have never made the test to determine that?

A. Naturally I wouldn't have.

Q. You wouldn't know the potential gas pressure built up [74] in the room from the escape of the ammonia gas in those coils?

A. Not exactly, but I have some idea.

Q. Have you ever made any measure?

A. No, because you wouldn't go into that kind of a thing.

Mr. Leshner: We object on the ground there is no foundation.

Mr. Briney: I will join in the objection.

The Court: The objection is overruled.

(The last question was read as follows: "Question: From your experience and your observations, can you tell us what happens when you get an escape of a large quantity of ammonia into a closed room, as far as the pressure created in that room by the escaping ammonia?")

Mr. Briney: May I add that I will object, it is immaterial.

(Testimony of A. C. Black.)

The Court: Objection overruled.

Q. (By Mr. Evans): Do you have the question in mind now, Mr. Black?

(The previous question was re-read.)

Q. (By Mr. Evans): What happens, does the pressure go up? A. It goes up.

Q. Can you tell us the pressure that that ammonia was under there in those coils of that unit, do you know that? [75]

A. Normally I would say when it is operating it would be probably nothing, but as the machine shuts off the pressure builds up.

Q. Explain that to me.

A. As the room warms up the ammonia increases, which expands and creates pressure.

Q. How much pressure is created in a room approximately the same size as this freezer room?

A. It could have been as much as 40 pounds.

Q. As much as 40 pounds of pressure in there?

A. Yes.

Q. In your opinion would that be sufficient pressure to force the door of the freezer room open?

A. It could have.

Mr. Briney: I object, there is no foundation whatever. This testimony in the abstract is immaterial. There is nothing to show this gentleman knows anything about the nature of the catch on the door, the weight of the door, the pressure created inside, outside or otherwise in these particular coils. As far as we know he never looked at the coils, except by

(Testimony of A. C. Black.)

casual observation. This is a matter for expert testimony.

The Court: He testified the door would open with a pressure of 15 pounds per square inch. He says he knows that or that is his approximation of it. The answer may [76] remain.

Mr. Briney: May I ask a question on voir dire?

The Court: You can cross examine him. I am going to let him testify.

Q. (By Mr. Evans): How long were you here following this occurrence, Mr. Black?

A. About a day and a half.

Q. During the time that you were here, did you have occasion to notice if ammonia had made any change in the walls of the freezer room?

Mr. Briney: I object, no foundation, if the Court please, unless he knew something about what the walls were like before.

Mr. Evans: We have evidence in the case there was no flaking of the walls prior to this occasion.

The Court: He may answer.

Q. (By Mr. Evans): Put it this way, during the time you were here following this ammonia being loose in the freezer room, did you observe any flaking or any change in the appearance of the walls in the freezer room?

A. Just at that time, yes, it had just happened, so therefore the conditions were there, but I mean no flaking appeared. It had turned the paint yellow.

Q. It had turned the paint yellow?

A. Yes. [77]

(Testimony of A. C. Black.)

Q. But there was no apparent flaking at that time?

A. Not at that time, because it hadn't had time to disintegrate.

The Court: Mr. Black, you mean you observed the paint was yellow?

A. That is right.

Q. (By Mr. Evans): From your previous experiences, Mr. Black, can you tell us whether or not ammonia getting onto these type walls that were in this freezer room will cause a flaking of the paint?

A. It will.

Mr. Evans: That is all.

Cross Examination

Q. (By Mr. Briney): Do you know what color the walls were before this incident occurred?

A. They were white.

Q. How do you know that?

A. I was in the plant before this happened and saw the plant.

Q. In the freezer room? A. Yes.

Q. Do you know anything at all, sir, about this particular door so far as its manufacture or method by which it sealed [78] the particular freezer room?

A. They have a rubber seal and have a rubber flap at the bottom which shuts from the outside. But pressure from the inside can pass through the flap, due to the fact that the flap is setting in this position from the inside going out.

Q. The adjustment of the door, I take it, it can

(Testimony of A. C. Black.)

be adjusted, can it not, to withstand greater or less hand pressure or other pressure?

A. That is right, it has an adjustment.

Q. Do you have any knowledge of what pressure it had been adjusted to by the contractor that put the door in, prior to the incident you came to Tucson for? A. No.

Q. Therefore, you wouldn't know how it was adjusted in relation to whatever pressure might have been built up in the room from any cause?

A. No.

Q. Or how it might have been adjusted in relation to what adjustment was on similar doors from other Swift operations? A. That is right.

Q. Were you present, Mr. Black, at any time when Mr. Gerhart ran any tests on the Busch coils to determine the leak? A. No. [79]

Q. You don't, of course, have any personal knowledge whatever of the pounds pressure per square inch created within the freezer room we have been talking about was at any time before the 4th or 5th of December, 1955?

A. No, I couldn't.

Q. You have no way of knowing how much might have got out from under the seals, you wouldn't know? A. No.

Q. Your recollection I think you said was that the leak you ascertained—can you tell me which of the two coils, the north or south coil, had the leak when you observed it? A. Is this north?

(Testimony of A. C. Black.)

Q. Yes, sir.

A. I believe it was that one on the north.

Q. On the north? A. I believe so.

Q. Was it in place in the ceiling or taken down?

A. It was on the ceiling.

Q. What did you do, get upon a stepladder and look at it? A. On a ladder.

Q. Would Defendant's Exhibit J in evidence indicate the approximate manner in which that particular coil sat on the ceiling, attached to the ceiling, at that time?

A. Exactly like it shows, bolted right up to the ceiling [80] in a correct manner.

Q. Did you see any photographs taken of this equipment? A. No.

Q. Can you point out, Mr. Black, approximately where the leak was on the unit?

A. No—as well as I remember it was on the end of the coil, I am not sure.

Q. These little tubes?

A. On this tube, but I am not sure just where it was at.

Q. On Exhibit J in evidence you notice there appears to be an open end of the particular unit here? A. Yes.

Q. An upright or vertical heavy tube, then various smaller diameter tubes?

A. That is right.

Q. In relation to the heavy as against the smaller diameter tubes, where was the leak?

(Testimony of A. C. Black.)

A. It was in the smaller tubes.

Q. You have seen equipment of that kind time and time again? A. Oh, yes.

Q. What is your opinion as to whether the leak you observed was within a portion of the coil inherent in the manufacture, or whether it was in a portion of the coil that the installers would put together? [81]

A. Well, I would say this was just a defective unit. That is the only way I would know how to put it, because I wasn't here when it was put up.

Q. But the particular coils that you have referred to and shown in Exhibit J, they are not installed by the people that put the equipment in the building, are they?

A. They are put up by various different means.

Q. Looking at the particular Busch coil in the photograph, the people that install it make a connection to the wall and connect it where the ammonia goes in, right?

A. I wouldn't say about that.

Q. You don't know?

A. I don't know about that. There is different manners of putting it in.

Q. Have you ever seen leaks like that on coils before of this nature? A. Yes.

Q. In your opinion the cause of such leaks is what? A. Defective unit.

Q. Defective manufacture?

A. Defective manufacture of the unit.

(Testimony of A. C. Black.)

Q. There was no leak in any of the major couplings shown on the unit, was there?

A. Not that I know of.

Q. The only leak was actually in an aluminum small [82] diameter coil?

A. As far as I know.

Mr. Evans: If you are trying to get at any idea of any negligence on the part of your people in installing it, we don't raise that question at all. While it is pleaded in Count Three, we have no objection to Count Three going out, the negligence count. We have no reason to believe there was anything done wrong by the York people.

The Court: I take it you are dismissing Count Three?

Mr. Evans: Yes, sir. And that might save us some time.

Mr. Briney: I have nothing further.

Cross Examination

Q. (By Mr. Leshner): Mr. Black, this type of coil you have been testifying about, this Busch coil is the type which is normally used in freezer rooms?

A. That is right.

Q. This is not the type coil that is normally used in what they have called here the cold storage area?

A. No, they are two different types.

Q. You use an altogether different type?

A. That is right. [83]

Q. Swift & Company designed this arrangement

(Testimony of A. C. Black.)

here, did it not? A. That is right.

Q. The arrangement of the freezer room?

A. Yes.

Q. And in your experience a room this size, referring again to the freezer room, would need two of these coils to keep the temperature down to the minimum level? A. They figure they will.

Q. If this freezer room were larger they would have to add another coil?

A. They would have to add another coil, depending on the square feet in the room.

Mr. Leshner: I have nothing further.

Mr. Evans: I have nothing further.

The Court: It is noon. We will recess until 1:30.

(Noon recess.) [84]

Afternoon Session

June 10, 1958, 1:30 o'clock p.m.

VICTOR JAMES ANDREW

recalled to the stand, testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Evans): I believe when you were on the stand before, Mr. Andrew, you were requested to try to approximate the total expenses incurred at your operation here in the preparation of and the selling of meat products? A. That's right.

Q. Have you been able to do that?

A. Yes, I have.

Q. Will you tell us how you did it or what you have done?

(Testimony of Victor James Andrew.)

A. Our sales, our gross margins are shown on a per hundredweight basis. To be consistent, I took the expenses for that same particular month, and that was worked out on a per hundredweight basis, and that came to \$1.99 a hundredweight. Figuring that times the weight, that approximately is two cents a pound, and I used that figure to save multiplication, it comes to about 578.64 for expenses.

Mr. Leshner: Will you repeat that, sir? [85]

A. \$578.64. That is on 28,938 pounds.

Q. Is that number of pounds the total number of pounds of products that had to be disposed of as a result of the ammonia exposure?

A. That's right.

Q. At my request did you obtain some checks or cancelled checks of the company reflecting payments made by Swift & Company for the material furnished and the services purchased under the contract of May 31, 1955 with the Arizona York Company?

A. Yes.

The Court: Exhibit 1?

Mr. Evans: Yes, sir.

Q. (By Mr. Evans): I will hand you Plaintiff's Exhibit 12 marked for identification and ask you if you will identify those checks for us?

A. There are three checks here. The first two were partial payment and the last one is full settlement, I presume, of the contract. The first payment was made August 15 for \$13,424.05, and it was made out to the order of Arizona York Refrigeration Company. The second payment——

(Testimony of Victor James Andrew.)

Q. I note the payee on the check is C. J. Olson, Relief Office Manager?

A. It is made out to C. J. Olson, Relief Office Manager. That was because I was on vacation and I was the only one [86] that had power of attorney, so I make the checks out to him and he in turn draws a check for our various suppliers and so forth, and endorses it and makes a special endorsement on the back to them.

Mr. Evans: We offer Plaintiff's Exhibit 12 in evidence.

Mr. Leshner: I have no objection.

Mr. Briney: No objection.

The Court: Received.

(Plaintiff's Exhibit 12 received in evidence.)

Cross Examination

Q. (By Mr. Briney): The first check of August 15, 1955 is payable as you have indicated; the second one of August 28th, '55, and, of course, it is payable to Arizona York Refrigeration Company?

A. Yes.

Q. The third check is dated February 2, 1956 and is payable to whom?

A. Southern Arizona York Refrigeration.

Q. It is signed by yourself? A. Right.

Q. At the time you wrote that check, you knew that Southern Arizona York was the party entitled to receive the money? A. Yes. [87]

Q. And it was Southern Arizona York who continued on the contract at about that time for serv-

(Testimony of Victor James Andrew.)

ices? A. Yes.

Q. And you knew that?

A. Yes. I wasn't aware of this reorganization or change in title. I drew the checks but Mr. Christian-son and representatives of the construction department prepared the voucher and I merely drew the check:

Q. There is a voucher that would precede this check No. 10422, a voucher in the amount of \$1,053.39 payable to Southern Arizona York?

A. Right.

Q. You prepared the check based on the voucher? A. Yes.

Q. And you would agree that Swift & Company knew then of the existence of Southern Arizona York and its proper relationship to the contract with you people? A. Right.

Mr. Briney: I have nothing further.

Mr. Leshar: Nothing, your Honor.

HARRY ROBERTSON

recalled to the stand, having been previously sworn, testified further as follows: [88]

Recross Examination

Q. (By Mr. Evans): Mr. Robertson, can you clear us up on who ordered the Bush units which were installed originally in the Swift plant here in Tucson, what company, which company?

A. Arizona York.

Q. Arizona York. That is the company that en-

(Testimony of Harry Robertson.)

tered into the original contract with Swift & Company?
A. That is true.

Q. Was there ever any written agreement with Swift & Company that provided for a substitution of Southern Arizona York for Arizona York in the agreement of May 31, 1955?

A. Mr. Christianson advised that he didn't feel it would be necessary according to the terms of the transfer.

Q. Then I take it your answer is no, that there was never any written agreement from Swift accepting Southern Arizona York as a successor to Arizona York?
A. No.

Q. Which company, or the employees of which company, actually installed the Bush units that we are concerned with in this case?

A. The original units?

Q. Yes, sir, the original units.

A. Employees of Arizona York.

Q. Arizona York. You did make an inspection of this [89] equipment after you were notified of this ammonia break of December, '55, did you not?

A. No, I did not.

Q. You did not? A. I did not.

Q. You weren't there at all? A. No.

Q. You apparently obtained information in some manner as to what happened to this machine, or to the unit?
A. Yes.

Q. What was the source of that information?

A. From our service man.

Mr. Evans: That is all.

Mr. Briney: I think I will reserve my examination. It might be more orderly if I do so.

Mr. Evans: The Plaintiff rests, if your Honor please.

Mr. Briney: If the Court please, as I understand it, Count Three has been dismissed so there is no need to concern ourselves with that further, am I correct?

The Court: That is right.

Mr. Evans: That is correct.

Mr. Briney: I will move at this time for judgment in favor of the defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company and against the plaintiff Swift & Company upon the grounds and for the reasons [90] that the amended complaint, Counts One and Two thereof, fail to state a claim against either of the said defendants upon which relief can be granted. There has been a failure to prove as to either count, the material allegations of the complaint. As to each cause of action stated in Counts One and Two, these defendants are entitled to a dismissal and a judgment.

Very briefly, Count one as it is written is predicated upon express and implied warranties allegedly breached by Arizona York. As a result of the alleged breach of warranty, damages are asked in the sum indicated. The evidence, I think, while rather brief, was that the coils in question, those which had been put in place prior to September 4, 1955, were replaced, and new coils were supplied. To our view, this constitutes as a matter of Law a reci-

sion of the contract, and the claim for damages is gone. Count Two constitutes a claim for damages for breach of implied warranties only under clearly the Uniform Sales Act, the particular warranty dealing with seller knowing the purpose of the goods and defendant relying on them, and so forth. The same evidence would apply that the coils had been replaced, substituted new coils, that as a matter of Law constitutes rescission. Section 69 of the Uniform Sales Act is quite clear. That is Title 44, Section 269, and I won't argue the language at this time, but it is the section providing for election of remedies and while the [91] record isn't as complete as it will be, there is evidence of substitution and rescission, as a matter of law. Over and above that, on each of the two counts, I believe there is no showing of any breach of warranty express or implied either from the express language of the articles of agreement and specifications which are in evidence, or the provisions of the Uniform Sales Act. What the complaint seeks is consequential damage, damage done to products because of defective coils. There is no evidence that it was within the reasonable contemplation of the parties to this contract that consequential damages should be covered. It seems to me rather clear, as a matter of fact, that the only legitimate argument that could be made as to reasonable contemplation of the parties would be as to stuff in the room that, within the room that those coils were to keep cold, certainly not stuff outside served by a door which our people have nothing to do with. Those coils weren't

to keep anything cold, but that particular room. That is the position we take on that.

Nowhere in the contract, articles of agreement and specifications do we believe there exists an express or by implication from the nature of the transaction, any warranty of payment for consequential damages at all, absolutely none. The interpretation properly applied to the contract is to replace without charge for materials or [92] labor things that go on a fritz.

The Court: Where is that?

Mr. Briney: I have to dig a little bit. I hate to sit here and tell the Court what the contract says when I haven't heard counsel.

The Court: I am interested when you are speaking of express warranty.

Mr. Briney: I am anticipating what they are going to argue, I guess. The general conditions of the contract attached to the articles of agreement to my knowledge refer to a problem of guarantee or warranty only in Section—the only one that counsel apparently has given their concern to is subsection 21 of the general conditions, and it reads: "No certificate given," et cetera, "shall be construed as acceptance of defective work or improper materials," and so forth. Then it goes on, "no payment or certificate final or otherwise shall be construed as relieving the contractor from his obligations to make good any defective—on consequences thereof discovered in his work and after acceptance of the same, other than those due to accident, abuse," et cetera. I interpret that as no

warranty of consequential damages, certainly not outside the reasonable contemplation of the parties. There is no testimony as to the contemplation of the parties at all. They have failed to prove. You can't speculate. If this contract calls for [93] interpretation orally as to reasonable contemplation of the parties, the burden is on the plaintiff to prove it. It is not on the defendant to disprove it. There is no testimony as to the reasonable contemplation of the parties. The language alone I think does not infer an agreement to pay for damage of this nature, certainly not to the extent of the claim. Subsection 32 talks about indemnity provision for many claimed expenses against the owner by reason of person or property. I have always felt very clearly that doesn't have any application here. What that is talking about is during the job if York knocks a wall down with a truck, for instance, or somebody gets hurt by York men doing part of the job, then they would naturally indemnify. That is a standard provision. I don't think that has any application to this.

If my recollection is right, that is all that is in the articles or general conditions that could be relied on as setting up an express warranty. The only other matter I am aware of that would contain any express language that would place any obligation upon our people is contained in the specifications which I shouldn't have mentioned on the pre-trial, but whichever specifications apply, and I am a little dubious myself, because neither of these is the one referred to in the articles of agreement dated May

—the articles of agreement incorporate—strike that. The [94] general conditions of the contract refer to specifications dated March 10, 1955, page 1 through 10, inclusive. Neither of these Exhibits 9 and 10 conform to that designation. As a matter of fact, while one of them at least has ten pages, there certainly aren't ten numbered pages.

The Court: Is that No. 9?

Mr. Briney: Yes. It has ten pages. They aren't numbered 1 through 10. That is a little odd to say nothing else about it. In any event, both 9 and 10 have language to this effect: Guarantee that the design, materials and workmanship of the machinery, et cetera, should be first class in every respect suitable for the purposes intended, that all parts furnished by the contractor to operate and perform the functions to present durable service. I would certainly interpret what I just read: All parts furnished to operate and properly and be durable. That isn't any guaranteed past replacement. The next language is no payment over and apart should be construed as a guarantee. It doesn't add a thing to anything existing. The only language that I can see is an express warranty and I don't think it does a bit more than the Statute would in any event; in fact, the language sounds like the Statute, that the design, material and workmanship, machinery and all parts of the plant furnished shall be first class in every respect suitable for the purpose intended. We would contend that is not express warranty of [95] payment for consequential damages of this character. In any event, it

doesn't go any further than the Uniform Sales Act applies. The nature of the complaint is such that no matter what argument might be made how or what theory this case could be presented on, this is a case for breach of contract, breach of sale, breach of warranty on sale. Count One, you can read it, and that is exactly what it says. This is not a claim for breach of contract to do work and labor. All you have to do is look at Count One, and paragraph 3, warranted all equipment, material and workmanship. 4: about December 5th, express and implied warranty provided was breached by defendant when ammonia escaped from defective equipment installed by, as a result of breach of warranty. What they are talking about is a breach as to these coils. That is all they are talking about. Equally, more so is that true as to Count Two, which appears to be clearly a statutory claim based on the Uniform Sales Act, we putting in a system knowing the purpose for which it is to be put. The language is very clear, a claim for breach of warranty of sale. Both Counts are claim for breach of warranty of sale. That is not unusual as evidenced by two Federal cases and another I have a note of here. One holds that a refrigeration system installed is a sale under the Uniform Sales Act. The other one holds a conveyor belt, conveyor system, is a sale, and another holds an elevator [96] installation is a sale, all under the Uniform Sales Act. Somewhere in this map I have it. The Federal cases are 219 Fed. 2d 573. They hold that the installation of a refrigerator system in a slaughter

house was one for sale of goods rather than for labor and materials, and it was within the provisions of the Sales Act, implied warranty. In the same volume, 219 Fed. 2d 583, holding the installation of a conveyor system in a plant was for sale of goods rather than for labor and material, and fitted within the Sales Act.

A Colorado case, 81 Pac. 2d 764, Fifteenth Street Investment Company vs. People, and it holds to the same effect as to an elevator installation, \$52,000 involved. Undoubtedly a lot of work was labor and they held and the language is useful I think, the fact that work and labor has to be done in connection with materials sold going along with the fact it doesn't change the essential character of the transaction and if the whole or any measurable part of the consideration for the performance of the contract is compensation for the material, it is a sale. That is a tax case. I grant you that, but it does fit the interpretation of the other two cases, and the way the case is pled, that is what we have here, as I interpret it.

For those reasons and to that extent without extending it any further, I think the record is devoid of the necessary [97] proof of damages.

I think the motion for judgment in favor of the two York Companies and against the plaintiff, a good ground is that the plaintiff has failed to prove the damages proximately resulting from any acts or omissions of this defendant. Any contractual violation, statutory or otherwise, there is a gap in the proof that is required. While the cases on both

sides, I think the majority of the cases say that loss of profit is generally not recoverable unless specifically it is within the contemplation of the parties and certainly the testimony here as to costs to Swift don't exist. And to the extent that the actual cost out of pocket loss to them is the measure of damages and the proof is insufficient.

The Court: Mr. Evans, if you will tell me what you rely on for express warranty.

Mr. Evans: The provision in the specifications, if the Court please, on page 2 of both sets of the specifications, and it is identical language. In addition to that, we don't agree that, with Mr. Briney, as to the limited effect of the provisions of Section 32 of the general conditions of the contract providing that the contractor will indemnify the owner for any injury suffered to the owner's property caused by the contractor. In addition to that, we certainly do rely on the Statutory provisions for implied warranty where nobody could possibly escape the conclusion where you are [98] given a set of plans and specifications providing for the equipping and installing of equipment to do a certain job, but what that knowledge is communicated to the person that did on the contract and eventually gets the contract, but what he is charged with the notice, the purpose for which the job or the work of the material or the goods is intended, and there we have the statutory warranty which comes in the Uniform Sales Act. We rely on both things, on all the points I have mentioned to the Court.

The Court: The motion for judgment is denied.

MAURICE D. GERHART

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Briney): State your name, please?

A. Maurice D. Gerhart.

Q. Your business or occupation?

A. I have a refrigeration service business.

Q. How long have you been in the refrigeration business? A. About thirty years.

Q. You live in Tucson now? A. Yes, sir.

Q. In your business have you had occasion to inspect various types of refrigeration equipment, refrigeration coils, with the view to determining any failures or defects in them? A. Yes.

Q. In December, 1955, did you have any occasion to inspect Busch coils on the premises of a certain company plant on East 17th Street?

A. Yes, sir.

Q. Will you state as best you can remember what the circumstances were surrounding your inspection of those units? Do you remember when it was specifically you went out there?

A. No, I don't remember. It was about '55—'56, I don't remember exactly.

Q. If I told you there was a failure and leak in ammonia damage about December 4th or 5th, 1955, would that help you as to the dates you went out? A. That was about it.

Q. A few days after that would you say?

A. Yes. I was called on the phone by an insur-

(Testimony of Maurice D. Gerhart.)

ance adjuster to see if I could devise some plan that would pinpoint a leak in a coil, and I told him I thought we could do it, so we set the coil up.

Q. Tell what you did and who was there at the time. [100]

A. We set the coil up. I plugged one end. There were two openings in the coil, and the other opening was connected to an ammonia drum. When we allowed the ammonia to enter the coil, naturally it came out the leak. We then burned sulphur in the presence of the leak and in so doing that, sulphur and ammonia combined form a white fume which can readily be seen, and he took pictures of this, actions that took place, and I think it pinpointed the position of the leak in the coil.

Q. What was the position of the leak in the coil?

A. It was in the interior of the coil itself, that is, it wasn't in any external connection where a mechanic would have made a connection; it was in a part manufactured in the factory.

Q. Specifically which portion of the coil are you referring to?

A. It was where a feeding element had, was inserted into a tube in the coil.

Q. I call your attention to a series of photographs numbered Defendant's J in evidence. As to J in evidence, I will ask you if that shows the type coil you inspected in place on the ceiling?

A. Yes, that was the type of coil.

Q. Then calling your attention to Defendant's Exhibit K in evidence, I in evidence, and G in

(Testimony of Maurice D. Gerhart.)

evidence, I will ask you [101] if those pictures show the results of the tests with regard to the clouds of smoke, if I used the right word, when you burn sulphur in the presence of the activated coils?

A. Yes, sir.

Q. Can you by referring to any particular of those three photographs point out to the Court where the leak was? Do they sufficiently show you the specific point of the leak?

A. Well, I can't see here now there is any specific——

Q. Let me call your attention to Defendant's K in evidence, does that show the end of the unit, the coils of the heater element inserted in the inner coils? A. Yes, sir.

Q. Can you point out where the heater elements go in the tubes, just by an "x" at the various points with a pen? A. These are the heaters.

Q. Put "x's" by them. Are there a series of them? A. Yes.

Q. Put an "x" on each one of them. How about the ones up above?

A. Yes. Not all of these leaked.

Q. I understand that. From relation to those "x's" and the relation to these "x's" where was the leak?

A. Where the tube itself, where the heater element of the tube entered into the header right at the point where I have an "x". [102]

Q. By the header you mean the big wide piece of metal tube that runs vertically up and down?

(Testimony of Maurice D. Gerhart.)

A. Yes.

Q. Was the leak at one or more than one place where the elements entered the header?

A. At one place, as I remember.

Q. And the photographs showing the smoke, do they demonstrate the existing leak?

A. Yes, sir.

Q. I will show you a color photograph, Exhibit C in evidence, and ask you if that also shows the test conducted and the results, physical results of the test?

A. Yes, sir. That is the indication that there was a leak in the coil, came from the coil itself.

Q. Can you give me an opinion as to the cause of the particular leak, based on your experience?

A. No, sir, I don't think I could. I determined in my mind it was in the manufacture of the coil. It was inherent when the coil was manufactured. It wasn't after the coil had been manufactured. What caused it, I could not say.

Q. Did you have anything further to do with that particular equipment?

A. No, sir. We disconnected the equipment and I left the coil there. [103]

Mr. Briney: No further questions.

Mr. Leshner: I have nothing.

Mr. Evans: I have nothing.

The Court: Are you through with Mr. Gerhart?

Mr. Briney: Yes.

(Witness excused.)

LEE GIDEON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Briney): State your name, please.

A. Lee Gideon.

Q. Where do you live?

A. 4553 East Tyndall, Tucson.

Q. What is your present business or occupation?

A. Refrigeration mechanic.

Q. For whom do you work?

A. Walley Sevits York.

Q. How long have you been with Sevits?

A. Since the first of this year.

Q. Were you ever employed by Arizona York Refrigeration Company? [104] A. Yes.

Q. Will you state the periods when that employment commenced?

A. I don't remember. Just when I came into town I went to work for them and stayed with them all the way through, even during the change over to Southern Arizona York.

Q. About how long a period of years did you work before either Arizona York or Southern Arizona York?

A. I don't remember. I worked for York since 1950 and the dates when they changed hands, I don't know the dates.

Q. Were you in the employ of Arizona York Refrigeration Company from, say, the 1st of January, 1955, up until September 1, 1955?

(Testimony of Lee Gideon.)

A. I think so, yes.

Q. From September 1, '55 to the end of the year, were you employed by Southern Arizona York?

A. If those dates are correct, I was.

Q. If that is true, that was the status of your employment? A. Right.

Q. What, if anything, did you have to do with the installation of Arizona York or Southern Arizona York of a refrigeration system at Swift plant at East 17th Street?

A. None on the installation.

Q. What? [105]

A. None on the installation.

Q. What was your first contact with the job?

A. I started up to check out.

Q. About when was that?

A. The dates I can't tell you.

Q. In relation to December 4, 1955?

A. It was prior to that.

Q. About how long?

A. Three months, four months.

Q. Did you go out to those premises at that time? A. Yes.

Q. Did anybody from York go out with you?

A. Probably at various times.

Q. Would you tell me what you did there at that time?

A. Well, we started charging the equipment up with ammonia, started in the operation, checked out anything that could be the matter with it.

(Testimony of Lee Gideon.)

Q. What?

A. We started it up, checked it out at the temperatures and controls and so forth and put it into operation.

Q. I take it you weren't concerned with installation, you were a service man? A. Right.

Q. Whose responsibility with York was it to see that this job out there ran properly? [106]

A. Mine.

Q. Did you have any occasions when any leaks were reported to you or your company?

A. Yes.

Q. Can you tell me approximately when the first was reported?

A. I can't remember, but they were in advance to the bad one.

Q. By the "bad one", do you refer to the ammonia leak of December 4 and 5? A. Yes.

Q. Were you out there at that time, too?

A. Yes.

Q. How many initial calls were there about leaks or troubles prior to the serious difficulty?

A. There were three that were repaired. I might have had more calls than that due to the fact there were a few leaks not detected when the unit was cold. At times when it was frozen when we would get there, the leaks probably were very minor and as time went on they got bigger, calls were more numerous than the three times when they were repaired.

Q. In relation to December 4, 1955, can you tell

(Testimony of Lee Gideon.)

me about what dates those leaks occurred by months, say?

A. I think we probably had over a two months period of time, three that were repaired, and I don't remember how [107] many calls.

Q. Did any of those leaks occur prior to the 1st of September of that year?

A. I don't think so.

Q. Then you say you can recollect three repairs prior to——

A. That I was able to find on the job.

Q. Calling your attention to the first time you went out in connection with the leak, what did you discover and what was done?

A. I found a leak in one of them and we got a welder to come in and weld it.

Q. When you say "one of them", what are you referring to?

A. One of the electrode tubes.

Q. Were they in the freezer room?

A. Yes.

Q. How many coils were in the freezer room?

A. Two.

Q. And the manufacturer's name of the particular coils? A. Busch.

Q. Do you know in which of the two coils the first leak was discovered?

A. The south coil.

Q. By south, you mean at the south end of the freezer room? [108] A. Yes.

Q. Was the unit in place at that time?

(Testimony of Lee Gideon.)

A. Yes.

Q. Both units were? A. Yes.

Q. And the repair work was done with the units in place, or were they removed?

A. In place.

Q. Who was present when you made that first examination and discovery of the leak?

A. I don't know how many, but I know Frank Rosinski was.

Q. How did you determine the leak?

A. By burning sulphur.

Q. Did you do that yourself? A. Yes.

Q. Where was the leak?

A. It was in the electrode tube.

Q. Is that something your installation people had anything to do with? A. No.

Q. What did you do about repairing it?

A. Called in a welder and he welded it shut and pulled the electrode out.

Q. Who was the welder?

A. George Audish. [109]

Q. Was any charge made to Swift & Company as far as you know for that?

A. Not to my knowledge.

Q. Do you know who paid for the welding that was done? A. Southern Arizona York.

Q. Do you have any personal knowledge as to what they were compensated by somebody else for?

A. No.

Q. The second leak occurred roughly how long after the first one?

(Testimony of Lee Gideon.)

A. It wasn't too awfully long, when we got the second one.

Q. How did you get wind of that, did you get a telephone call?

A. I had a telephone call, yes, sir.

Q. Who sent you out?

A. Probably Mr. Robertson. I wouldn't know for sure.

Q. What did you discover when you got to the premises?

A. The same thing that I had before.

Q. In the same coil or another coil?

A. I think this time it was in the other coil.

Q. The north coil? A. I believe so.

Q. Could you pinpoint for us where the leak was?

A. The same kind of a leak exactly, electrode tube. [110]

Q. Is that something where the installation of your people had anything to do with it?

A. No.

Q. What was done about that leak?

A. The same procedure, pulled the electrode tube and welded it.

Q. Did anybody give you any instructions as to the method in which the repairs should be made?

A. Yes.

Q. Who? A. Red Butler.

Q. Who is he?

A. I am not just exactly sure, but he represents

(Testimony of Lee Gideon.)

Bush, whoever sells for Bush from the West Coast, Riverside, California. I talked to him by phone.

Q. That was in connection with the first or second leak? A. The first and the second.

Q. Was Mr. Butler present at any time during any of those repairs?

A. Not while the repairs were being made.

Q. Was he in town; did you have any discussions with him yourself as to the making of any of those repairs? A. Yes.

Q. Approximately when was that in relation to the second leak and repair of the second leak? [111]

A. I called him.

Q. What was the nature of the discussion?

A. He told me to pull the tube and repair it again and said he would come down.

Q. Did he come down? A. Yes.

Q. You did repair it the way he told you?

A. Yes.

Q. Do you know whether Swift was charged for any of that work?

A. I don't believe they were.

Q. Do you know who paid for the work?

A. Arizona York, I think.

Q. Do you have any personal knowledge that they were compensated by anybody else?

A. No.

Q. Was there a further occurrence or incident of a similar nature? A. Yes.

Q. In relation to the second leak, about when was that? A. Shortly thereafter.

(Testimony of Lee Gideon.)

Q. Who made the service call? A. I did.

Q. What did you find when you got there?

A. The same trouble. [112]

Q. In connection the coils north or south?

A. South coil.

Q. That is the one you originally worked on?

A. Right.

Q. Can you pinpoint the approximate place where the leak had occurred?

A. In the electrode tube.

Q. Were you present when Mr. Gerhart undertook to test the coils and see where the leak was?

A. No, I wasn't.

Q. Did you each time you went out there on the service calls make the test you indicated you did the first time, with sulphur? A. Yes.

Q. And with ammonia in the coils?

A. Yes.

Q. Can you point out on Defendant's Exhibit K the approximate location of say the third leak? Let us assume that is the north coil. Do you notice some "x's" Mr. Gerhart put on there, but disregarding those, can you tell us approximately where the leak was?

A. Right where he has the "x's".

Q. On one or more of those electrode insertions?

A. At one, a different one at each time.

Q. But only one each time? [113]

A. Only one each time.

Q. What repairs, if any, did you make the third time? A. The same repair.

(Testimony of Lee Gideon.)

Q. What did you do?

A. Pulled the electrode tube and welded the tube shut.

Q. What does an electrode do?

A. It defrosts the coil.

Q. It is a heating element?

A. It is a heating element.

Q. When the electrode is pulled, what affect has that on the operation of the coil?

A. Slower to defrost or less heat.

Q. When you sealed off the particular tube, did you seal it off at each end of the unit?

A. Yes.

Q. What is the effect of that with regard to the operation of the unit?

A. None so far as efficiency is concerned, I believe.

Q. Did you other than those three occasions, did you have any further contact with or connection with either of the coils in the freezer room at the Swift plant prior to December 4th or 5th, 1955?

A. I probably worked on them, but nothing serious.

Q. At any time during your presence at the plant for those three repairs, and any other service calls, did anybody [114] at Swift discuss with you the problem of whether you were working for Arizona York or Southern Arizona York?

A. No, sir.

Q. Did anybody ever refuse to let you proceed with the job because you were working for South-

(Testimony of Lee Gideon.)

ern Arizona York? A. No, sir.

Q. Who did you deal with at the Swift plant in each of the three cases?

A. Generally Frank Rosinski. He would be the one who would call me.

Q. Did you have any contact with a Mr. Craig?

A. Yes.

Q. When did you have contact with him?

A. Approximately every call we would have conversation.

Q. How about Mr. Christianson, did you have occasion to meet him during any of those service calls? A. Yes.

Q. What was your understanding of his relationship to the project or operation of the plant?

A. After the plant was put into operation, Christianson stayed around for awhile to iron out any difficulties he might see and so forth and get the temperatures at the proper temperatures and control and then he left and he came back a few times, but he just happened to be around. We didn't have any actual business, conversations, on those other calls. [115]

Q. The third time, the third leak you repaired, did Audish do the work then too? A. Yes.

Q. Do you know if Swift was charged for any of that work? A. I don't think so.

Q. Do you know who paid for the work?

A. Southern Arizona.

Q. Do you know whether anybody else repaid Southern Arizona for it? A. No.

(Testimony of Lee Gideon.)

Q. Tell me, what was the cause of these three leaks in your opinion?

A. I think the coil inside ruptured.

Q. Do you have an opinion as to the cause of the rupture? A. Just a theory.

Q. What is your theory?

A. I believe condensate froze within the tube on the freezing cycle expanding the tube.

Q. Resulting in what?

A. In a broken tube.

Q. Since that time have you had, done any servicing on any other Busch coils in place at that Swift plant? A. Yes.

Q. When was the last time you did any work on such coils at that location? [116]

Mr. Evans: I object to this as immaterial and irrelevant, servicing subsequent to the occasion of which we are involved.

Mr. Briney: What I have in mind is asking him about the difference in design or manufacture. I think it is material.

The Court: In Busch too?

Mr. Leshner: I have no objection.

Mr. Briney: Different coils were manufactured differently, as I understand it, and I want this witness to tell us what he can about that, establishing the defect in the original design.

The Court: He may answer.

A. Yes, last week.

Q. (By Mr. Briney): Are the units, the coils in the freezer room, now of the same design with

(Testimony of Lee Gideon.)

regard to the heating elements in the tubes as those you repaired prior to December 4, 1955?

A. The heating elements are, the design is different.

Q. In what respects?

A. The tubes are sealed.

Q. Are they Busch units you have worked on since the damage occurred in December, '55?

A. Yes.

Q. Did you have occasion to be on the Swift premises [117] in close relation to December 4 and 5, 1955? A. Yes.

Q. Will you state the date to your best recollection when you were there?

A. I know it was on a week-end on early Monday morning and a conversation since, it is on December 5th, the morning of December 5th.

Q. What were the circumstances under which you went out there?

A. Frank Rosinski called me early in the morning, I think 5:00 o'clock or so, and said he had a bad leak and I went over.

Q. What did you find when you got there?

A. I found the building full of ammonia.

Q. Did you get into the building to the freezer room at that time?

A. Not immediately, no.

Q. Approximately what time of what day did you go to the freezer room?

A. I am lacking in memory, but that ammonia was pretty strong and I went in and closed valves

(Testimony of Lee Gideon.)

and opened doors to the main leak room right then with a mask on and when I was able to go to the freezer room, I can't tell you.

Q. Did you go to the freezer door sometime thereafter? A. Yes. [118]

Q. Can you tell me whether the door to the freezer room was open or closed when you first saw it? A. It was open.

Q. Tell me what took place then? Were you on the premises on and off during the next several days? A. Yes.

Q. What was done?

A. They had a little time getting the meat out and getting permission to move the meat, and after it was moved out we hosed down all the walls in the freezer room and got the ammonia out so that they could get back in the building.

Q. What did you do with regard to the coils that were in the freezer room after you had the place clear of ammonia?

A. I closed the valves, pumped them out, closed the valves and let them sit.

Q. Were they removed from the ceiling and placed on the floor?

A. Not while I was there.

Q. Did you attempt to ascertain the cause of the leak December 4 or 5 of '55? A. Yes.

Q. Was that at the time after you got the ammonia out and closed out the units?

A. Yes.

Q. What did you observe to be the cause of the

(Testimony of Lee Gideon.)

leak? [119] A. Another electrode leak.

Q. Which coil?

A. I am pretty sure the south coil again.

Q. Was this leak at a place where repairs had been made on prior occasions? A. No.

Q. Was the leak of the same character?

A. Yes.

Q. Did you at that time or later make any tests of the equipment, run through any testing procedures to ascertain the cause of the leak?

A. After I found and knew where it was, I closed them off and quit until I decided what to do.

Q. What became of those two coils, if you know?

A. They were removed and replaced.

Q. When was that?

A. The dates I can't tell you.

Q. Did you have anything to do with taking those two coils out of the freezer room?

A. No.

Q. Do you have any personal knowledge what dates they were removed? A. Not exactly.

Q. Did you have anything to do with actually putting any different unit in? [120] A. No.

Q. Do you know whether additional units were put in? A. Yes.

Q. What units, what coils were put back in?

A. Bush coils.

Q. Approximately when?

A. I presume it was three weeks or so after the break. I can't remember.

(Testimony of Lee Gideon.)

Q. Did you have anything to do with the putting of those new different coils into operation?

A. Yes.

Q. State what you did.

A. After they were up, I got them started up and into operation.

Q. Did you undertake to inspect and test them prior to putting them in use? A. Yes.

Q. Did they test out all right? A. Yes.

Q. Let me take you back to the time when the original coils were installed. Sometime during the summer, late summer or early fall of '55, did you for Arizona York or Southern Arizona York test and inspect the Bush coils before they were installed?

A. Not before they were installed. [121]

Q. After they were installed and connected to the ceiling? A. Yes.

Q. Did you test them? A. Yes.

Q. What procedure did you use?

A. Ammonia.

Q. Were you satisfied with their condition before you put them in full use and operation?

A. Yes.

Q. At the time the new coils were put in some three weeks after the damage to the meat occurred, from the time you put them into operation, were the old coils still in the freezer room?

A. They were on the outside in the main building.

Q. In the cold storage room or outside?

(Testimony of Lee Gideon.)

A. Outside. That wasn't refrigerated space.

Q. Do you know what became of those units?

A. I suppose they went back to Busch.

Q. Did you ever see them back at Southern Arizona? A. They were there.

Q. Did you see them there? A. Yes.

Q. Approximately when? A. I don't know.

Q. Do you have any personal knowledge of what became of them after they were taken back there?

A. No.

Q. What relationship, if any, did you have to the refrigeration system in the Swift building subsequent to the installation in the two new coil units in the freezer room?

A. I did the service there every time there was any problem.

Q. With what frequency did you make service calls out there?

A. During the process of getting everything back into normal operation, several times to see that the temperatures were all right, and so forth.

Q. Whose employee were you at that time?

A. Southern Arizona York. It would be Southern Arizona by that time.

Q. Did you have dealings with any of the same men you have given us before for Swift?

A. Yes.

Q. Was any objection raised or any question raised who you represented or who you were working for? A. No.

Q. During the year 1956 after you had gotten

(Testimony of Lee Gideon.)

the new coils in operation in the freezer room, were you on the premises, the Swift premises, infrequently or frequently [123] during the rest of the year? A. I was called occasionally.

Q. Were you the person who normally made the service calls on all refrigeration units you installed?

A. Yes.

Mr. Evans: I think this is immaterial and irrelevant, if the Court please, way up into '56.

The Court: I don't see its materiality.

Mr. Evans: And I object to it.

Mr. Briney: No further questions.

Mr. Leshner: No questions.

The Court: You may be excused.

(Witness excused.)

HARRY ROBERTSON

recalled to the stand, testified further as follows:

Direct Examination

Q. (By Mr. Briney): You are the same Harry Robertson on the stand two or three times?

A. That's right.

Q. You were in the courtroom when Mr. Black testified this morning? A. Yes. [124]

Q. Do you remember he testified about a conversation with Harry Robertson at the Swift plant with regard to the coils and the defect in the leak?

A. Yes.

Q. Did you ever see him before you saw him in court this morning?

(Testimony of Harry Robertson.)

A. I don't recall ever having seen Mr. Black.

Q. Can you recall at any time after December 5, 1955 your having any conversation with Mr. Black or any gentleman at the Swift plant on East 17th Street in connection with the leaks or problem that resulted?

A. Not at the plant. I may have had some telephone conversations, but not at the plant.

Q. Who was the party on behalf of Arizona York Refrigeration who negotiated with the Swift representative concerning the installation of the refrigerator system at the 17th Street plant?

A. I did.

Q. With whom did you generally have your discussions?

A. All my discussions were with Mr. Christianson, construction superintendent.

Q. I think you have testified as to the original contract or articles of agreement that were entered into. You signed those for Arizona York, did you not?

A. That's right. [125]

Q. Can you tell me, Mr. Robertson, whether there were any changes made in the contract or specifications subsequent to the time the job got started?

A. There were some changes in design, the equipment for the beef chill room. There was a question about the quantity of thin coil surface to go in there and we discussed that and made recommendation about changes. There was a discussion about the substitution of units for the freezer room

(Testimony of Harry Robertson.)

and also the power characteristics of the units for the freezer room. I believe that was probably all the major items of discussion.

Q. With whom were those discussions held?

A. With Mr. Christianson.

Q. What was your understanding of his relationship to the job in Swift & Company?

A. It was my understanding he had the authority to negotiate this contract on behalf of Swift & Company.

Q. Did anybody else there ever undertake to step in and take over such negotiations?

A. I had no contact with anybody else.

Q. Were any of these changes initiated by Mr. Christianson?

A. Yes. There was one change and one I failed to mention, that was the original specification stated that Swift would furnish one of the two compressors. It was learned after the time of the original bid that Swift could not furnish this compressor and the two new compressors would [126] be required in the contract.

Q. Who prepared the specifications on which the job was done? A. I don't know.

Q. Was it Arizona York or Swift & Company?

A. Swift & Company prepared them.

Q. I will hand you Plaintiff's Exhibits 9 and 10 in evidence, which have been discussed before, and ask you where they came from? Were they supplied by York or supplied by Swift?

A. Supplied by Swift.

(Testimony of Harry Robertson.)

Q. At the conclusion, on the latter couple of pages on each of those exhibits you will notice a list of equipment. Who prepared, to the best of your knowledge, the list of equipment, Swift or York?

A. This is their list of equipment.

Q. Who of the two parties, York or Swift, determined the fans or blowers that would be in the freezer room and the capacity of same?

A. The capacity of the units is the capacity as stated in the description of the units, and we offered as a suggestion that they substitute Busch of the same equivalent capacity for use in lieu of the Krack model set down in their specifications.

Q. You are talking about fans rather than coils?

A. I call them a fan coil unit, the blower unit.

Q. There has been some discussion about the fans or blowers that has some effect perhaps on opening the door to the freezer room. Are those the ones you are referring to?

A. That is correct.

Q. But the capacity of those, I take it, is supplied from the specifications supplied by Swift?

A. Yes.

Q. Did you folks have anything to do with installing, planning, or designing the door to the freezer room?

A. No. That is not part of our contract.

Q. Were any of these changes you have indicated were discussed with Mr. Christianson reduced to writing?

(Testimony of Harry Robertson.)

A. We offered a letter subsequent to our original quotation suggesting changes of equipment.

Q. What is marked as Exhibit 10 in evidence, I think, has a front sheet with a date June——

A. June 1.

Q. 1955. Were those supplied to you by Swift & Company?

A. We have at least two sets of specifications.

Q. Was an additional set of specifications supplied after the job was started?

A. Yes. This presumably was following the beginning of construction.

Q. That is Exhibit 10? [128]

A. Yes, sir.

Q. Did you have any discussion at any time with Mr. Christianson regarding substitution of Busch—strike that. You have told us you discussed with Mr. Christianson substituting of Busch coils in the freezer room for Crack coils which have been mentioned in the specifications? A. That's right.

Q. Which type of coils were installed?

A. Busch coils were installed.

Q. Were those the coils you have heard some testimony about leaks having developed in them?

A. That is correct.

Q. Will you state approximately when you discussed with Mr. Christianson the substitution of the units?

A. As I recall, shortly after the signing of the contract, because delivery was an important item and we had a delivery confirmation on Busch which

(Testimony of Harry Robertson.)

could be furnished to meet Swift's delivery requirement.

Q. Did Mr. Christianson authorized the substitution?

A. He did. In fact, he was quite pleased to get that substitution.

Q. Can you give me the approximate date the installation was completed? I am not dealing with changes after the difficulty in December, but approximately when the installation was completed.

A. The middle of August or early September, 1955.

Q. Do you know a Tony Mitchell?

A. Yes, I do.

Q. Who is he?

A. He is a representative of Authorized Supply.

Q. And Authorized Supply Company, will you state what the nature of their business is, was at that time?

A. They are in the wholesale refrigeration supply business and furnish material and parts for the refrigeration units.

Q. Where was their office, Mr. Robertson?

A. Their office is located in Phoenix.

Q. Have you had prior business with Mr. Mitchell and his company? A. Yes.

Q. What line of products did Authorized Supply handle to your knowledge?

A. They have several product lines that they represent.

(Testimony of Harry Robertson.)

Q. Did they during the summer of 1955 sell Busch products? A. Yes, they did.

Q. During the time that your company was working on the installation of the refrigerator system at the Swift plant, did you see or talk to Mr. Mitchell? A. Yes, I talked with him. [130]

Q. Did Mr. Mitchell, was he aware of the nature of the job and the requirements of it?

A. Yes, he was.

Q. Did you have any occasion to order any materials from Authorized Supply Company in connection with the job? A. Yes, I did.

Q. What did you order?

A. We ordered two Busch coils and other ammonia accessories for use on that installation.

Q. With whom did you negotiate for the purchase? A. Mr. Mitchell.

Q. Were those oral negotiations originally, were they in Tucson or Phoenix by phone?

A. I believe they were by phone.

Q. About when was that? To refresh your recollection, I call your attention to Defendant's Exhibit N and M in evidence and ask you if that refreshes your recollection as to the dates you talked to Mr. Mitchell?

A. It was early June. This is dated June 4, 1955.

Q. Will you state the substance of the conversation?

A. Evidently I had asked by telephone for a quotation on the Busch units that would be of

(Testimony of Harry Robertson.)

capacity to handle this installation and Exhibit M is a letter from Authorized Supply Company quoting a price and delivery on the Busch units. [131]

Q. That is to your knowledge a true and correct photo copy of the original, is that right?

A. That's right.

Q. At the time the order was initially placed with Mr. Mitchell by phone, was he advised of the purpose for which the coils would be used?

A. Yes. I believe he knew what those were.

Q. Who chose the particular units, who determined the appropriate model number and size of the particular coils?

A. That is pretty well tied down as to size by the specifications. We have catalog data that give comparable sizes and capacities of units. I don't recall if it was his recommendation or mine from the catalog data, or maybe both of us, looking at the catalog to determine the capacity required for this particular job.

Q. Did you at that time have a catalog of Busch products which catalog had been supplied to you by Authorized Supply Company?

A. Yes, we had.

Q. And the particular units ordered and described were in that particular catalog you had at that time?

A. Yes.

Q. I take it you discussed, from what you have said, the job with Mr. Mitchell and the requirements of the job?

A. Yes. [132]

(Testimony of Harry Robertson.)

Q. As you indicated, Exhibit M constituted quotation of price, is that right?

A. That is correct.

Q. Did you then respond orally or in writing to the quotation?

A. We issued a purchase order subsequent to that time for two coils based on that quotation.

Q. Did you or did you not rely on Authorized Supply Company in purchasing and installing the Busch units referred to in your order?

A. Yes, we did.

Q. Are they the primary distributors of Busch products in Arizona?

A. They are the only source I had from Busch products at that time.

Q. In the past had you ordered Busch products from Authorized Supply Company?

A. Yes, we had.

Q. Was it your knowledge that their personnel were qualified with regard to the products they sold?

A. Very highly qualified.

Q. How about Mr. Mitchell? What was your experience say as of June, '55 as to his qualifications in selling Busch products?

A. I think it is correct to state that he is well [133] qualified by virtue of his association with the refrigeration industry and had called on our firm and rendered excellent service insofar as his company was concerned, and we felt that we would be well served by doing business with him on this basis.

Q. Did Arizona York and you rely on Mr.

(Testimony of Harry Robertson.)

Mitchell and his company's representatives as to the quality of the particular coil? A. Yes.

Q. And the order went out under purchase order No. 1785, Exhibit M, is that correct?

A. That is correct.

Q. Were there any subsequent changes or modifications in the order?

A. The current characteristics of the fan, it specified, I believe three phase which was going to delay delivery and we were able to get Swift to accept the single phase motor characteristics, and I so advised Authorized Supply on June 14 not to delay the order but to furnish available motor 220 volt single phase.

Q. Defendant's Exhibit B in evidence—strike that. Defendant's Exhibit O in evidence is a photocopy of what document?

A. Letter from Authorized Supply to Arizona York stating that delivery would be held up if we had to furnish motors as [134] originally specified.

Q. Who did you deal with in the Swift organization in connection with that suggested change?

A. Mr. Christianson.

Q. Did he approve the change?

A. Yes, he did.

Q. Then I will hand you Defendant's Exhibit P in evidence and ask you whether that is a true and correct photocopy of the letter you wrote to Authorized Supply stating that the change was satisfactory to Swift & Company?

A. It is, yes.

(Testimony of Harry Robertson.)

Q. Were there any further written instruments as to the particular sale of the coils between your company and Authorized Supply that you can recall?
A. Not that I remember.

Q. When did the coils come through to you from Authorized Supply or from Busch?

A. As I recall, they were delivered sometime in July.

Q. Were they installed? A. Yes, they were.

Q. Can you tell me who installed them?

A. Our installation crew. Do you want the names?

Q. If you know them.

A. Mr. Sayers and Mr. Wong. The others I wouldn't remember. [135]

Q. Of the total contract between your company and Swift & Company, the contract price, do you remember what it was?
A. \$18,257.

Q. Referring you to Exhibit 1 in evidence, Plaintiff's Exhibit 1, the contract price there is \$18,257, right?
A. That's right.

Q. What percentage of that contract price consisted of equipment or material supplied by your company?
A. I would say 70 to 75%.

Q. And the balance of the total contract price represented—
A. Labor.

Q. Prior to September 1, 1955 were you an officer of Arizona York Refrigeration Company?

A. No, I wasn't.

Q. Your precise job was what?

A. Manager of the Tucson division.

(Testimony of Harry Robertson.)

Q. Do I correctly understand that company operated both in Phoenix and Tucson?

A. That is correct.

Q. Mr. Ray, did you know him prior to September 1, '55? A. Yes.

Q. What was his capacity with the company?

A. He was president of Arizona York Refrigeration.

Q. Calling your attention to September 1, 1955, I ask you whether as of that date there was any change in the [136] organization?

A. Yes. Mr. Ray and his partner in the Arizona York Corporation——

Q. Whose name was what?

A. Maggs.—divided the company, Mr. Ray took me as a partner in the new corporation, Southern Arizona York Refrigeration Company, and Mr. Maggs took in two employees in Phoenix to the parent corporation.

Q. From and after September 1, 1955 were you an officer of the Southern Arizona York Refrigeration Company? A. Yes, I am an officer.

Q. What is your capacity?

A. Vice president.

Q. Who is the president? A. Mr. Ray.

Q. When was Southern Arizona York incorporated?

A. Early in September, 1955, the exact date I can't remember.

Q. State whether or not after September 1, 1955

(Testimony of Harry Robertson.)

any notification was given to Swift & Company as to the change in the corporation?

A. We issued a letter, joint letter stating the change, and forwarded that to all suppliers and contractors, and also, I know I discussed personally that situation with Swift representative, Mr. Christianson. [137]

Q. Approximately when was that discussion?

A. Oh, the middle of December, September, excuse me.

Mr. Evans: The middle of September?

A. Yes.

Q. (By Mr. Briney): I think maybe you have already referred to that discussion, but was it your understanding as a result of that discussion and any notification given that he was aware that Southern Arizona York was thereafter the party concerned in the contract with Swift?

A. Yes. He was aware of it.

Q. At any time did Mr. Christianson or anybody from Swift object to the proceeding under the contract, including the service warranty for the year after the contract was completed by Southern Arizona?

A. No, they didn't.

Q. Was there service performed by Southern Arizona York as a follow-up of the initial contract?

A. That is true.

Q. For what period of time did such service continue?

A. We are still performing service for Swift & Company.

(Testimony of Harry Robertson.)

Q. Services were performed by which company?

A. Southern Arizona York Refrigeration Company.

Q. To your best recollection, was one of these letters, joint letters, sent to Swift & Company in Tucson?

A. I don't recall for sure. [138]

Q. I think you indicated you sent to all parties—

A. Contracts still in progress, yes.

Q. Was the Swift contract still in progress on September 1, '55?

A. It was.

Q. Was there any warranty or guarantee which your company, either Arizona York or Southern Arizona York, received from Authorized Supply Company in connection with the sale of the two Busch units we have discussed?

A. No.

Q. Is there any customary standard practice in the business whereby any guarantee or any warranty of any kind accompanies said goods?

A. In some cases where you purchase delivery from a factory, they have a certain form. It isn't customary where you purchase from a jobber or sales representative.

Q. These were purchased, they were shipped directly from Busch, weren't they, the units?

A. I couldn't be sure.

Q. What if anything do you know about any leaks which occurred in the Busch coils which were installed in the Swift plant prior to December 4, 1955?

A. I know we had other leaks in the coils that

(Testimony of Harry Robertson.)

occurred. The first one, as I recall, was about a month after the plant was put into operation. [139]

Q. Let me backtrack. Did you send notice of the change in the character of the corporation to Authorized Supply Company?

A. Yes, we did.

Q. Was any objection ever made by them at any time whatever to your knowledge of any business dealings between Southern Arizona and Authorized Supply Company? A. No.

Q. During the time that the coils were billed for, the original coils were billed?

A. No, I don't.

Q. Can you tell me which corporation, Arizona York or Southern Arizona were billed for them?

A. The only record I have of the accounts payable ledger, which shows probably both companies paid, because they were on an open account basis with Authorized Supply.

Q. In connection with the first leak that occurred in Busch coils in the Swift plant, did you have any discussions or consultations with Red Butler for Busch Company?

A. As I recall, he called Authorized Supply at the time of the first failure, and the suggestion for repair was transmitted from them to us to have that coil repaired.

Q. The repairs were done by whom?

A. By Audish Welding.

Q. Who paid Audish? [140]

A. We did, Southern Arizona York.

(Testimony of Harry Robertson.)

Q. Were you repaid by another party for that expense?

A. We invoiced Authorized Supply, I believe.

Q. Did Authorized Supply pay for that work?

A. As I recall, Busch paid for it.

Q. In any event, would I be correct to say you were repaid for that expense? A. Yes.

Q. Did you have any further contact with Mr. Butler in connection with any of the leaks?

A. The subsequent leaks, we contacted him directly.

Q. Did he come to Tucson?

A. He did, yes.

Q. Can you recall about when that was?

A. I think it was in October. It was at the time of the second failure. He came to Tucson to check himself.

Q. Were you in company with him at that time in connection with that difficulty?

A. No. He went to the job with Mr. Gideon.

Q. Did you have any conversations with him about it, Mr. Butler? A. Yes.

Q. Where was that?

A. In our office.

Q. Who was present? [141]

A. I don't recall.

Q. What was the conversation?

Mr. Evans: We object to it as hearsay.

The Court: This is with Mr. Butler?

Mr. Briney: Yes, sir.

The Court: Objection sustained.

(Testimony of Harry Robertson.)

Q. (By Mr. Briney): Who paid for the repairs done at the time the second leak was fixed?

A. I believe Busch did on that also.

Q. I am going to hand you Defendant's Exhibit L in evidence. Will you state what that is?

A. That is the accounts receivable ledger.

Q. What does it show?

A. It shows Busch Manufacturing Company paying \$23 to cover an invoice for that amount to Authorized Supply Company.

Q. What is the date of the payment?

A. It looks like 9/16.

Q. And the year? A. 1955.

Q. And the amount of the payment?

A. \$23.

Q. Do you know what that \$23 represents?

A. I believe that was Audish's bill for repair to that coil. [142]

Q. After Mr. Butler was over—I think you indicated the time of the second leak, was there another leak prior to December 4th and 5th?

A. Yes, there was.

Q. Who paid the bill for the repairs?

A. I am not sure.

Mr. Briney: There is an exhibit attached to Mr. Butler's deposition that appears to be unmarked, which I am going to remove.

Q. (By Mr. Briney): You have heard the testimony that on December 4th and 5th there was a leak in the Swift plant that caused damage to products? A. Yes.

(Testimony of Harry Robertson.)

Q. Were you on the premises after that occurred? A. Not immediately.

Q. When did you get out there, do you remember? A. No, I didn't.

Q. Within a period of days, would you say?

A. Two or three days.

Q. Did you have any discussions with anybody at the Swift plant with regard to the cause of the trouble? A. No, I didn't.

Q. Did you then on any subsequent time have any discussions with anybody at the Swift plant with regard to removing the two coils which were in place at the time the trouble occurred [143] in the freezer room? A. Repeat that.

Q. Did you have any conversation with anybody at Swift concerning the removal of the two coils in the freezer room at the time the loss and damage occurred?

A. As I recall, most of the conversations regarding the removal of the coil or replacement of the coil, Mr. Ray had with Swift & Company.

Q. Do you know whether or not the two coils, Bush coils, in place at the time of the trouble were removed thereafter? A. They were removed.

Q. Approximately when?

A. Late in December.

Q. What became of them?

A. They were returned to Bush.

Q. By whom?

A. I believe we shipped them.

Q. Southern Arizona shipped them direct?

(Testimony of Harry Robertson.)

A. Yes.

Q. What then was done with regard to furnishing additional necessary equipment at the Swift plant?

A. We replaced those coils with an improved design of coil furnished to us by Bush.

Q. And were new coils supplied and put in place?

A. Yes. Our man put them in place. [144]

Q. Approximately when?

A. Late in December.

Q. Those new coils were supplied to you by whom? A. By Bush.

Q. Did you have any discussions concerning that substitution with anybody at Authorized Supply?

A. No, I believe not.

Q. Who handled that, if anybody?

A. Mr. Ray handled that.

Q. Did you have anything to do with any correspondence concerning that?

A. No, I don't think so.

Q. I will hand you Defendant's Exhibit G for identification and ask you if you will state what that is? A. That is a bank deposit slip.

Q. For what company?

A. Southern Arizona York Refrigeration Company.

Q. What is the date of the deposit?

A. December 16, 1955.

Q. The first item on the deposit is what?

A. Bush Manufacturing Company, \$23.

(Testimony of Harry Robertson.)

Q. What does that mean to you, sir?

A. That, as I recall, was more repair, the treatment made by Audish.

Q. Is that the same leak you referred to in connection [145] with repayment?

A. Yes, I think so.

Mr. Briney: I offer it in evidence.

Mr. Evans: I have no objection.

Mr. Leshar: I have no objection.

The Court: It may be received.

(Defendant's Exhibit G received in evidence.)

Q. (By Mr. Briney): Did Swift & Company use the new units, Mr. Robertson? A. Yes.

Q. Was it with their agreement the old coils, the coils in place on December 4th and 5th, '55 were removed, was it not? A. Yes.

Q. Do you know whether there was a balance due and owing on the Swift contract as of September 1, 1955? A. There was, yes.

The Court: On September 1st?

Mr. Briney: September 1, 1955.

Q. (By Mr. Briney): I hand you Exhibit, checks, Plaintiff's Exhibit 12 in evidence and direct your attention to one check in the amount of \$7100, approximately, to Arizona York Refrigeration dated October 28, 1955. That was in connection with the installation, was it, sir? A. Yes. [146]

Q. And the check was deposited in whose account, sir?

(Testimony of Harry Robertson.)

A. To the account of Southern Arizona York Refrigeration Company.

Q. And the third check dated February 2, 1956 in the sum of \$1,053 payable to Southern Arizona York, was that check on the contract for the installation of the entire system? A. Yes, it was.

Q. Were there any further payments so far as you know from Swift to Southern Arizona York in connection with the job?

A. There was some small items for extra work, minor items, and some work in connection with the truck, should be over and beyond the contract.

Q. The payments for those additions was made by whom?

A. Made by Swift to Southern Arizona York.

Q. Those are supplementary matters and not referred to in the original contract?

A. That is correct.

Q. That work was done approximately when?

A. August, September.

Q. 1955? A. 1955, yes.

Q. Was any of that work done after September 1, '55? A. Some was, yes.

Q. Do I take it payment was made for all that extra work [147] after September 1, 1955?

A. It was, yes.

The Court: We will take the afternoon recess at this time.

(Afternoon recess.)

(After recess.)

HARRY ROBERTSON

a witness herein, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

Q. (By Mr. Leshner): Mr. Robertson, let me see if I understand the sequence of events correctly. Sometime after the 4th of December or 5th of December, you and someone representing Swift & Company got together and agreed that the two cracked coils would be—or the broken coils, would be replaced without cost to Swift, is that right?

A. It was not me.

Q. You did not have anything to do with that?

A. No.

Q. Were the two coils that evidenced the cracks replaced? [148]

A. Yes, they were.

Q. And at the time they were replaced, Swift was given full credit for the purchase price on the old coils they turned back, isn't that correct?

A. You say full credit? There was no charges or credits made. Just installed the new ones and removed the old ones.

Q. You just took back the old coils that proved to be defective and installed new ones?

A. Correct.

Q. Swift didn't pay you for that?

A. No.

Q. As far as you know, are the coils presently in the Swift plant the same ones you installed in late December, '55?

A. No, they are not.

Q. How long did those coils stay there?

(Testimony of Harry Robertson.)

A. I believe the second set of coils were installed in either May or June of '56.

Q. The coils that were cracked you took out in December, '55, you took back physically to your own establishment, did you not? A. Yes.

Q. And you arranged through Authorized Supply to have those coils replaced by Bush and Company, is that right? A. That's right. [149]

Q. And you shipped those broken coils, or defective coils, directly from your place back to Connecticut to Bush? A. Yes.

Q. And you received in return two new coils from Bush in West Hartford, Connecticut, did you not? A. That is correct.

Q. Those two replacement coils were supplied to you through Authorized Supply free of charge, were they not? A. That is correct.

Q. It is quite common in your business, isn't it, sir, for you to order a unit through a jobber or wholesaler and then have the unit delivered to you directly from the manufacturer, rather than coming through the jobber?

A. Yes. It is quite common.

Q. As a matter of fact, that is how the original coils that proved to be defective or alleged to be defective, that is how those coils got to you in the first place, directly from Bush in West Hartford, Connecticut?

A. I believe so, I am not sure.

Mr. Leshner: I have nothing further.

Mr. Evans: We have nothing.

(Testimony of Harry Robertson.)

Redirect Examination [150]

Q. (By Mr. Briney): The Bush coils you originally ordered through Authorized Supply Company, you indicated you had occasion to refer to the catalog. Were they ordered by description?

A. By model number, yes.

Mr. Briney: I have nothing further.

Mr. Leshner: Nothing.

Mr. Evans: Nothing.

P. Z. RAY

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Briney): State your name, please.

A. P. Z. Ray.

Q. And your address?

A. 7032 Via Pisa, Tucson.

Q. What is your business or occupation?

A. I am president of Southern Arizona York Refrigeration Company.

Q. Is that a corporation?

A. That's right.

Q. How long has it been in existence as such?

A. Since the 1st of September, 1955. [151]

Q. And what is the state in which the company was organized? A. The State of Arizona.

Q. The other officers in the corporation, Mr. Ray, are what persons?

A. Mr. Robertson and my wife.

(Testimony of P. Z. Ray.)

Q. Prior to September 1, 1955, were you associated with a corporation of a different name, Mr. Ray? A. Yes, sir.

Q. What was the name of the corporation?

A. Arizona York Refrigeration Company.

Q. And for how long were you associated with Arizona York? A. I organized it in 1950.

Q. Who were the other officers of Arizona York immediately prior to September 1, 1955?

A. There were only two in the company and they were Mr. Al Maggs and myself.

Q. Who was the manager of Arizona York Refrigeration Company in Tucson prior to September 1, 1955? A. Mr. Robertson.

Q. He now is an officer of Southern Arizona York, is that correct? A. That is correct.

Q. You have been in court all day, have you not? [152] A. That's right.

Q. And heard the testimony from the various people concerning the contract, articles of agreement, entered into between Swift & Company and Arizona York Refrigeration Company, have you not? A. That's right.

Q. And were you familiar with the contract and nature of it and jobs to be performed for Swift?

A. Yes, I am familiar with it.

Q. When did you first move into Tucson personally; when did you move here?

A. I personally moved here September 15th. I didn't move my family here until the next year, September 15, '55.

(Testimony of P. Z. Ray.)

Q. Were you in Tucson on occasions on company business prior to September 1, '55?

A. Yes, every week.

Q. Was the Swift & Company job on East 17th Street completed on September 1, 1955?

A. There was some work to be performed and was virtually complete by that time.

Q. Who performed the work necessary to complete the contract?

A. Southern Arizona York.

Q. Was there a contract balance due to Arizona York or Southern Arizona York under the contract from Swift & Company [153] as of September 1, '55?

A. Part of the assets I took over, a balance something like \$7100.

Q. Did the contract with Swift have a service warranty attached to it?

A. Well, it had a standard warranty, I believe.

Q. Who performed the services under that warranty after September 1, '55?

A. Southern Arizona York.

Q. At any time did Swift & Company object or protest as to the method of performing the service warranty? A. No.

Q. At any time did Swift & Company protest as to the replacement of the coils, for example, after September 1, '55 through Southern Arizona York Refrigeration Company? A. No.

Q. You have heard the testimony that certain payments were made by Swift subsequent to Sep-

(Testimony of P. Z. Ray.)

tember 1, '55 and one check dated February 2, '56 was payable to Southern Arizona York, which was a portion of the contract balance due and owing, is that right? A. That's right.

Q. Do you agree with Mr. Robertson that some extra work was done subsequent to September 1, '55 and payment was made by Swift to Southern Arizona? [154]

A. Some made after September 1, 1955.

Q. I will hand you Defendant's Exhibit A in evidence and ask you if you will state what it is?

A. This is an agreement of sale of my share of stock in the Arizona York Refrigeration Company, taking in lieu of them the assets of the Tucson Division which was to be transferred and was transferred into the new corporation, the Southern Arizona York Refrigeration Company.

Q. Pursuant to the agreement?

A. Pursuant to the agreement.

Q. I will call your attention to Schedule A attached to the agreement and ask if you could state the—as to that schedule which constitutes accounts receivable—the amount of the accounts receivable from Swift & Company as of the date of the agreement? A. \$7,125.95.

Q. That accounts receivable was in connection with what work or business?

A. That was part of this contract.

Q. The contract originally between Arizona York and Swift?

(Testimony of P. Z. Ray.)

A. Between Arizona York and Swift and Company.

That is Plaintiff's Exhibit 1 in evidence, is that correct? A. That is correct. [155]

Q. Did Southern Arizona York assume, by virtue of the agreement, to service the Swift job as required by the articles of agreement originally entered into?

A. That is right. They agreed to service all contracts in progress or in operation.

Q. Exhibit B in evidence, state what that is.

A. Minutes of an organization meeting of the board of directors Southern Arizona York Refrigeration Company in which organization was made.

Q. I call your attention to Defendant's Exhibit T in evidence and ask if you can state what that is?

A. Special meeting board of directors. I haven't familiarized myself with these for some time, but I believe this is the agreement.

Q. Looking at the exhibit, does that certification evidence this is a true and correct copy of the minutes of a special meeting of the board of directors of Arizona York Refrigeration Company on August 31, 1955?

A. That is correct and I believe in which we agreed to divide the corporation up.

Mr. Briney: We offer it in evidence.

Q. (By Mr. Briney): I will call your attention to Defendant's Exhibit U for identification and ask you if you will state what that is?

A. That is a copy of the minutes of the meeting

(Testimony of P. Z. Ray.)

of the [156] Arizona York Refrigeration Company being certified by the Assistant Secretary J. A. Riggins.

Q. Do each of the Exhibits T and U deal with the termination of the Arizona York business in Tucson and the carrying on of the operation under the name of Southern Arizona York?

A. That's right.

Mr. Leshner: We have no objection to the two.

The Court: What is the date of "U"?

Mr. Evans: September 1, '55.

Mr. Leshner: We have no objection to T.

Mr. Evans: I have no objection.

The Court: What are you getting at in the long run, Mr. Briney, a novation?

Mr. Briney: I am trying to put the facts in evidence as to the relationship between the two companies of contract so that all facts available to us are here.

The Court: You don't try a lawsuit putting everything you can think of in evidence. I want your point.

Mr. Briney: The point is as we understand it, the Southern Arizona York Company is in the precise same status as Swift & Company in this lawsuit and on that contract as the original contracting parties, Arizona York Refrigeration Company.

The Court: What is your position as to the original [157] contract? What is their position?

Mr. Briney: By virtue of the original agreement in evidence, the Arizona York Refrigeration Com-

(Testimony of P. Z. Ray.)

pany gave up all of its rights under the contract and all of those rights were transferred to Southern Arizona York. By the same documents, Southern Arizona York has succeeded to all rights and interests and causes of action against Authorized Supply Company that originally might have existed in favor of Arizona York.

The Court: T is received.

(Defendant's Exhibit T received in evidence.)

Mr. Leshner: We have no objection to U.

Mr. Evans: No objection.

The Court: U will be received.

(Defendant's Exhibit U received in evidence.)

Q. (By Mr. Briney): Mr. Ray, did Southern Arizona York Refrigeration Company receive an assignment, original assignment, from Arizona York Refrigeration Company dated January 6th, 1958 assigning to Southern Arizona York any and all rights and causes of action which it had against Authorized Supply Company? A. Yes, sir.

Q. And looking at Defendant's Exhibit V for identification, I will ask you if that is the assignment? A. Yes, this is the assignment. [158]

Mr. Briney: I offer it in evidence.

Mr. Evans: No objection to V, your Honor.

Mr. Leshner: No objection, your Honor.

The Court: It may be received.

(Defendant's Exhibit V received in evidence.)

(Testimony of P. Z. Ray.)

Q. (By Mr. Briney): Mr. Ray, to your knowledge, was there ever any objection or protest made by Authorized Supply Company as to the change of Arizona York to Southern Arizona York in connection with adjustments and return of the original Bush units placed on the Swift job? A. No.

Q. Did Southern Arizona York and you as its president have occasion at any time after September 1, '55 to receive any correspondence from Swift & Company directed to Southern Arizona Refrigeration Company?

A. Yes, we had several letters.

Q. I will hand you a letter which is Exhibit R in evidence dated January 30, 1956 and ask you if you received that letter from Swift & Company so addressed as of that date? A. Yes.

Q. Did you have any correspondence, Mr. Ray, from Authorized Supply Company directed to Southern Arizona York Refrigeration Company after December 4 and 5, 1956? A. Yes.

Q. In connection with the particular coils that went bad [159] or their substitutions?

A. Yes. I had several letters from them.

Q. I hand you Defendant's Exhibits W, X and Y for identification and ask you if they are not letters from Swift & Company, its various departments, dated respectively December 23, '55, May 4, '56, May 11, '56, directed to Southern Arizona York Refrigeration Company in connection with the problem of the defective coils?

(Testimony of P. Z. Ray.)

A. That is correct. These are all letters directed direct to us.

Mr. Briney: I offer them in evidence.

Q. (By Mr. Briney): I will show you Defendant's Exhibit Q in evidence, and ask you if that is another letter from Authorized Supply directed to Southern Arizona York concerning the problem that arose having this trouble in December, 1955?

A. That is correct.

Q. Did you personally inspect the Bush coils after December 4 or 5, 1955 that were in the freezer room in the Swift plant?

A. The first coils that went bad you are speaking of?

Q. Yes, sir.

A. Not in the plant I never personally inspected, not the ones in the plant.

Q. What became of those coils, to your knowledge?

A. They were returned to our shop and afterwards I [160] received a letter from Mr. Mitchell with return material tags to ship them back to Bush and Company in Hartford, Connecticut.

Q. Was any charge made to Swift for those?

A. No.

Q. For replacement of those units?

A. No.

Q. Were they replaced?

A. They were.

Q. Approximately when did replacement occur?

A. The 27th and 28th day of December, '55.

(Testimony of P. Z. Ray.)

Q. Were any coils shipped to you from Bush direct? A. Yes, they were.

Q. Did you examine them at all when you got them? A. Yes.

Q. Did you notice whether or not there had been any change in design or manufacture with regard to the heater elements in the coil?

A. I had a letter from the president of the Bush Company stating it was a change in design they had made, and I did inspect them, and that was the second set of coils.

Q. And the men who did the replacement were employees of which company?

A. Southern Arizona York Refrigeration Company.

Q. There has been some reference here to a second [161] replacement of coils which occurred in 1956. Can you tell us the details and circumstances of that?

Mr. Leshner: I object as immaterial.

The Court: Objection sustained.

Q. (By Mr. Briney): With regard to payment for goods to complete payment for the installation under the articles of agreement, do you have any records which will show which constitutes requests for payment dated after September 1, 1955?

A. Yes.

Q. Can you produce those?

The Court: We have three exhibits marked for identification that are floating around.

Mr. Leshner: I have no objection to Exhibits X

(Testimony of P. Z. Ray.)

and Y. With regard to Exhibit W for identification, I object to everything except the covering letter to which I do not object.

Mr. Briney: I will withdraw the rest of the exhibit.

Mr. Leshner: Then I have no objection to the rest of the exhibit with the rest of the material withdrawn.

Mr. Evans: We have no objection. Should I take it off?

Mr. Briney: Okay.

The Court: Do you have any objection to it, Mr. Evans? [162]

Mr. Evans: No objection.

The Court: W, X and Y received.

(Defendant's Exhibits W, X and Y received in evidence.)

Q. (By Mr. Briney): You made reference to a letter from Bush Manufacturing Company regarding a change in design, did you not?

A. That's right.

Q. Is Exhibit Z marked for identification a true photostat of such letter? A. That's right.

Mr. Briney: I will offer it in evidence.

Mr. Evans: No objection to Z.

Mr. Leshner: No objection.

The Court: It will be received.

(Defendant's Exhibit Z received in evidence.)

Q. (By Mr. Briney): Exhibit AA for identifi-

(Testimony of P. Z. Ray.)

cation, which appears to be filled out, this final waiver of lien, will you state what that is?

A. This is a final waiver of lien on this contract which we gave waiver of any liens against the contract.

Q. And the date of it?

A. January 31, 1956.

Q. Signed by you?

A. Signed by myself as president of the Southern Arizona York Refrigeration Company. [163]

Q. Was the original of this document recorded? What became of the original?

A. We sent this to Swift & Company as a lien waiver and they asked for a lien waiver on each portion of the job as we went along and this was the final lien waiver.

Mr. Briney: We will offer it in evidence.

Q. (By Mr. Briney): There has been some discussion about the substitution of Bush coils that were in place December 4th, 1955 for Krack coils originally specified. Will you state briefly what your knowledge of that substitution was?

A. Yes. I originally estimated the job and used the estimate for Krack coils in there. We didn't get the contract until May 31. They had August 1st as completion date, which is only 60 days, and I called Specific Metals, which was the distributor or jobber for Krack coils and they told me they could not deliver these coils under 90 days, which was 30 days past our delivery date, and so consequently we related this information to Mr. Christianson and told

(Testimony of P. Z. Ray.)

him we were confident we could get an equal coil, and that was when Mr. Mitchell was contacted.

Mr. Leshar: We have no objection to Exhibit AA.

The Court: It will be received.

(Defendant's Exhibit AA received in evidence.)

Q. (By Mr. Briney): The two exhibits, Defendant's AC and AB, will you state what they are? [164]

The Court: Which are those?

Mr. Briney: AC and AB.

A. These are progress payments for various amounts of the work, stating the amount of the contract and the amount of money to be paid, the amount of money that has been paid and the balance due. We were required by Swift & Company to fill each one of these out before we got the payment.

Q. (By Mr. Briney): I notice neither of these copies is dated.

A. Frankly, we didn't date them because it was our copy and only the copies that went to Swift & Company were dated, apparently.

Q. Can you tell me the date or the approximate date of either of these requests for payment?

A. No, I can't tell you exactly, but I am quite sure it was after the 1st of September, otherwise it wouldn't have been under Southern Arizona York Refrigeration Company.

Q. Does that apply to both Exhibits AB and AC

(Testimony of P. Z. Ray.)

you now hold? A. Yes.

Mr. Briney: We offer them both.

Q. (By Mr. Briney): Did you have any conversations with Mr. Craig for Swift & Company in connection with the problem that developed after the leaks of December 4 and 5, 1955?

A. Yes, I did. [165]

Q. Will you state where those conversations were held?

A. I went out to the plant, the Swift plant, and I found out the extent of the damage and I talked to Mr. Craig during that day and a couple of days after that I had several conversations with him over the telephone.

Q. Can you state the substance of your conversations at the plant?

A. Can I refer to some notes I took at that time?

Q. Yes, sir. If by reviewing your notes you can tell us the substance of the conversation, will you do so, briefly?

Mr. Leshner: We have no objection to AB and AC.

The Court: They will be received.

(Defendant's Exhibits AB and AC received in evidence.)

A. May I proceed?

Mr. Briney: Yes, sir.

A. The notes I wrote at the time read as follows: "Called at the Swift & Company plant 950 East 17th Street, Tucson, Arizona. I arrived about 11:00 a.m. Inspected all of the refrigeration rooms

(Testimony of P. Z. Ray.)

and products. This was December 7th, this was after they had a chance to clean it out. Refrigeration room and product stored in them, there was a very strong odor of ammonia fumes in the air and all the products I inspected also seemed to smell strongly of ammonia. The main freeze meat room and freezer room were [166] the only rooms affected. The fresh poultry room was okay. Swift & Company was shipping fresh poultry out of it. I broke down Mr. ——,” and put a long dash mark, because I don't remember Frank's name.

Q. I just want the substance of the conversation.

A. They told me that the fresh poultry was unaffected. I went into Mr. Craig's office and introduced myself and expressed my sorrow over what had happened, and he told me he felt it was something beyond our control and had told Mr. Snoke of the General Adjustment Bureau he felt we were reliable people representing one of the oldest and biggest companies in the business. Mr. Craig expressed his desire to get back into operation as soon as possible and wanted to know what he should do with the product that was affected. I told him I could not tell him what to do, as I had no authority to do so, but Mr. Snoke, of the General Adjustment Bureau had called me about 9:00 o'clock and told me he had talked with Mr. Butler of the Bush Manufacturing Company of Riverside, California, and they were sending a man out today and I assumed it was their adjuster. He asked me

(Testimony of P. Z. Ray.)

to call as soon as I heard anything further, as they were anxious to make a decision on disposing of the affected product. We discussed what could be done with it and he felt a lot of the product could be salvaged, that bologna, cured sausage, salami, cheese, and so forth, would be okay. [167] We also inspected a case of butter. The carton smelled strongly of ammonia. Mr. Pier of Swift & Company tasted the butter and said it was okay and thought it would be all right to send out.

The Court: If there is no objection, why don't you put these notes in evidence.

Mr. Briney: All right.

Mr. Leshar: I have no objection.

Mr. Briney: I would offer them in evidence as the next numbered exhibit as being the records of the conversations referred to with Mr. Craig.

Mr. Evans: No objection.

The Court: Exhibit AD in evidence.

(Defendant's Exhibit AD marked in evidence.)

Q. (By Mr. Briney): Mr. Ray, subsequent to these discussions with Mr. Craig, the replacement of the units and the coils for the freezer room went ahead as you indicated before?

A. That's right.

Q. Did you ever have any conversations at any time with anybody representing Swift & Company to the effect—strike the question. Do you know Mr. Barrett? Did you know Mr. Barrett about that time?

(Testimony of P. Z. Ray.)

A. Yes, sir. I have known Mr. Barrett a number of years.

Q. Were you present at any conversations which he had [168] with Mr. Christianson at the Swift plant prior to the trouble in December, 1955?

A. I was over there when Mr. Barrett was in the process of putting those rooms in. He was the subcontractor putting the rooms in. He was building. He was putting the insulation and finish on the refrigeration rooms.

Q. Who was present other than Mr. Barrett, Mr. Christianson and yourself?

A. That is all I can recall being present, is the three of us.

Q. State your conversation at that time.

A. Mr. Barrett objected to using the type of product they were using. He called it by the trade name which I cannot recall, that they finished the wall with. He wished to use a mastic, a moisture proof mastic, and he stated to Mr. Christianson he used the product before and felt it wouldn't hold up on the walls and he wanted to use this mastic which he had had good experience with and Mr. Christianson told him it was a product from Swift & Company and they wanted to use it for experimental purposes.

Q. At that time or any other time prior to December 4, 1955, did you personally observe any flaking on the materials of the walls of the freezer room?

A. The first time I was in the plant after it

(Testimony of P. Z. Ray.)

was put in operation, I recall where the air blast comes off the [169] coils right directly on the ceiling it commenced to flake off. That was as far as I know before we had any ammonia leak whatsoever, because I was there about the time of the opening.

Q. Can you tell me whether Authorized Supply is an Arizona corporation, do you know anything about the status of their incorporation?

A. No, I don't know.

Q. At all times during 1955 was it doing business to your knowledge in the State of Arizona, Authorized Supply Company?

A. As near as I remember they were during '55.

Q. Mr. Ray, the refrigeration coils that were put into the freezer room initially, the Bush coils, was there anything dangerous about them, if they are defective, that type of equipment, anything about them that is dangerous to persons or property if they leak or are defective?

A. Well, the coil is not dangerous, the ammonia fumes themselves are dangerous if you have—if you can't get away from them.

Q. In your experience, ammonia free will cause damage to persons and property, both?

A. If it is free it will.

Q. Was it Mr. Robertson or yourself that dealt primarily with Authorized Supply Company in connection with the purchase [170] of the original coils?

A. Mr. Robertson.

Mr. Briney: That is all.

(Testimony of P. Z. Ray.)

Cross Examination

Q. (By Mr. Evans): I think you said, Mr. Ray, that the replacement coils were installed on the 27th and 28th of December, 1955?

A. That is what our labor ticket shows.

Q. That probably would be accurate?

A. That is when the men worked on it, was during those two days.

Q. Of course, at the time that was done, you knew the extent of the damage that had happened at the plant by reason of the leak in the original coils?

A. Not the total extent, but we knew shortly thereafter the total extent.

Q. I thought the letter Mr. Briney showed you from Mr. Craig that had the list—

A. That was my first knowledge of the total.

Q. Of the total dollar-wise?

A. That's right.

Q. I notice that is dated December 23?

A. That's right.

The Court: What exhibit? [171]

Mr. Evans: Exhibit W, dated December 23, and attached to that was a list that purported to show the extent of the damage to the meat products down there?

A. That's right.

Q. (By Mr. Evans): That of course is apparently prior to the time that the replacement coils were installed?

A. That's right. They hadn't arrived.

(Testimony of P. Z. Ray.)

Q. You never at any time had any conversation with Mr. Craig in which you told him that if Swift & Company would forget its claim against your company or any other person for its damage to the meat products, you would put in new coils, did you?

Mr. Briney: I object as immaterial.

The Court. You may answer.

A. Restate that question.

Q. (By Mr. Evans): You at no time prior to the installation of these new coils had any conversation with Mr. Craig in which you told him or intimated to him in any way that if Swift & Company would give up any claim it had against your company for the damage to its meat products, that your company would at their own expense, install new coils?

A. No, I never had no such conversation.

Q. No conversation. It never entered your mind to do so?

Mr. Briney: I object whether it ever entered his mind. [172]

The Court: That would be immaterial.

Q. (By Mr. Evans): I think you stated that when you learned that the Krack coil was not available right away, that you went to Mr. Christianson and reported that to him?

A. Mr. Robertson did, not I. I reported to Mr. Robertson they were not available.

Q. But you could get an equal coil that would do the job, just as well?

(Testimony of P. Z. Ray.)

A. We could get the other coils and he said he was glad to get them.

Q. Because he was in a hurry? A. Yes.

Q. Of course it was indicated those would do just as well as the other ones?

A. As far as we knew they would.

Q. I think Mr. Briney asked you or you stated to him when these replacement coils were installed by your company in the latter part of December of '55, that there was no charge made to Swift & Company for that installation or for those replacement coils? A. No, they were not.

Q. And likewise, no credit was given to them or no reimbursement of any type?

A. No. There was no transaction of any kind as far as I know. [173]

Q. Your dealings with Swift & Company up through February of 1956 consisted that you do the work that was required under the contract, that you had some extra work that was agreed upon subsequent to the making of the original contract, the prices were agreed upon, you did the work and Swift & Company paid you or paid Arizona York and Southern Arizona York the agreed amount?

A. I don't know. You covered so much ground there I don't know if I got it all or not.

Q. Arizona York made an agreement to do a certain job for a certain price?

A. That's right.

Q. That job was done and Swift & Company

(Testimony of P. Z. Ray.)

paid for it? A. That's right.

Q. There was also in addition to the original job, some extras? A. That's right.

Q. They were agreed upon and that work was done either by Arizona or by Southern Arizona and Swift & Company paid for that?

A. That's right.

Q. As far as contract payments were concerned, at the end of January, 1956 or February, 1956, your scores were settled as far as owing any money from Swift & Company to you [174] on the contract?

A. I don't know when the final payment came in.

Q. I think the check showed February 2, 1956. Would that be about right?

A. I would say something like that.

Mr. Evans: That is all.

Mr. Briney: I have no further questions.

We will rest, if the Court please, at this time.

Mr. Leshar: Your Honor, at this time I would like to make a motion on behalf of the Third Party Defendant Authorized Supply Company for judgment in its favor on the third party complaint on the ground first that there is no competent evidence in the record to support a judgment on either count of the Third Party Complaint. First of all, there is to the extent that the complaint, that is, the second amended third party complaint is based upon negligence, there is, of course, no showing of negligence in any way. Neither is there any showing either under negligence or under warranty of any proper damages. There is no evidence

from which the proper measure of damages can be ascertained. On the further ground perhaps more fundamental, that the evidence in the case affirmatively shows, first, that the only warranties made by the third party defendant to the defendant were implied warranties made under the Uniform Sales Act and that by return of the coils to the third party defendant and the acceptance [175] of replacement coils from the third party defendant, the defendant, that is, the Southern Arizona York and Arizona York and/or Arizona York, made a binding and conclusive election of remedies by which this second amended third party complaint is barred.

I am a little impressed with the probable futility of adding to what the Court already knows about the law on this one, but I ask leave to file in support of the motion, this memorandum, copies of which have already been handed to counsel, which goes only to the point last made, that the evidence shows binding and conclusive election of remedies. I think the law in Arizona is quite clear. There is some authority to the contrary which authority is cited in the memorandum together with what I think is the overwhelming weight of authority supporting the third party defendant's position.

Two cases in Arizona, of which the Court is undoubtedly aware take the position along with the great majority of the courts, that the return of the product purchased and the acceptance of a substitute product is under the Uniform Sales Act a binding and conclusive election of remedies and

thereafter a breach of suit for consequential damages based on the breach of warranty is barred.

The Court: Motion denied.

Mr. Briney: If the Court please, I would again urge the motions that I presented at the end of the plaintiff's [176] case for judgment in favor of Arizona York and Southern Arizona York and against the plaintiff on both counts one and two of the complaint for all the reasons urged at the conclusion of the plaintiff's evidence.

The Court: That motion is denied also.

Mr. Leshner: Your Honor, the third party defendant will present no evidence, and rests.

The Court: Is there any rebuttal?

Mr. Evans: I have no rebuttal, your Honor.

The Court: That is all the evidence then?

Mr. Evans: Yes, sir.

The Court: I would like counsel to brief the matter, and how much time do you gentlemen desire?

Mr. Evans: My only problem is I have a pretty good schedule of trials for the next few days.

The Court: Let me say this, Mr. Evans, it may help all of you. I am going to be going to Prescott on the 2nd of July. I am not going to be able to push the thing through. I will be pretty well taxed getting ready to go and clean up matters here. I like to get these matters decided promptly, but there is no point in your rushing briefs when I can't get to it anyway.

Mr. Evans: May I suggest that we have 15 days in which to file our brief? Do you want to do them simultaneously or responding? [177]

The Court: I think it best they be responding in this instance. Supposing the plaintiff is given 15 days, the defendant 15 days to answer, and to open as to the third party defendant. The third party defendant, 15 days, and then both the plaintiff and defendant 10 days after that for the final brief.

Upon the filing of the briefs, the matter will stand submitted. [178]

[Endorsed]: Filed November 24, 1958.

[Endorsed]: No. 16274. United States Court of Appeals for the Ninth Circuit. Authorized Supply Company of Arizona, a Corporation, Appellant, vs. Swift & Company, a Corporation, Arizona York Refrigeration Company, a Corporation, and Southern Arizona York Refrigeration Company, a Corporation, Appellees. Arizona York Refrigeration Company, a Corporation, and Southern Arizona York Refrigeration Company, a Corporation, Appellants, vs. Swift and Company, a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Arizona.

Filed: December 1, 1958.

Docketed: November 10, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16274

AUTHORIZED SUPPLY CO. OF ARIZONA,
Appellant,

vs.

SWIFT AND COMPANY, et al., Appellees,

and

ARIZONA YORK REFRIGERATION CO., et al.,
Appellants,

vs.

SWIFT & COMPANY, Appellees.

STIPULATION AND DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

It is hereby stipulated by and between counsel for all of the parties herein that the Record on Appeal shall be, and is hereby, designated to be that record heretofore designated as the Record on Appeal in the U. S. District Court for the District of Arizona in that cause, No. Civ-909-Tuc, entitled Swift & Company, a corporation, plaintiff, vs. Arizona York Refrigeration Company, et al.

BOYLE, BILBY, THOMPSON AND
SHOENHAIR,

/s/ By RICHARD B. EVANS,

Attorneys for Swift & Company.

DARNELL, HOLESAPPLE,
McFALL AND SPAID,

/s/ By RICHARD C. BRINEY,
Attorneys for Arizona York Refrigeration Co. and
Southern Arizona York Refrigeration Co.

MAY, LESHER & DEES,

/s/ By ROBERT D. LESHER,
Attorneys for Authorized Supply
Company of Arizona.

[Endorsed]: Filed December 24, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF POINTS ON WHICH AP-
PELLANT AUTHORIZED SUPPLY CO.
INTENDS TO RELY ON APPEAL

In accordance with the provisions of Rule 75 (d) of the Rules of Civil Procedure and of Rule 17 (6) of the United States Court of Appeals for the Ninth Circuit, the appellant Authorized Supply Company states the following as the points on which it intends to rely in this appeal:

1. The Third-Party Complaint is based upon the alleged breach of an implied warranty held to exist in this case by virtue of Section 44-215 (1) of The Arizona Revised Statutes of 1956. In point of fact, the sale by this appellant (the Third-Party Defendant) to the plaintiff Southern Arizona York Refrigeration Company, of certain refrigeration coils later found to be defective was a sale of a speci-

fied article under its patent or other trade name, under Section 44-215 (4) of ARS, 1956, to which sale no warranty of fitness attached. The trial court therefore erred in finding that this appellant warranted the fitness of the coils to the defendant and third-party plaintiff.

2. Even if the sale was made under Section 44-215 (1) of ARS, 1956, with an implied warranty of fitness attaching, the third-party plaintiff waived its cause of action here sued on by making an election of remedies inconsistent with it. When the coil was found to be defective, causing the damage to plaintiff's property, on which the Complaint is based, third-party plaintiff returned it to third-party defendant, which replaced it without cost with a new unit. The return of the defective unit and acceptance of the replacement constituted a binding and conclusive election of remedies under ARS, 1956, Sec. 44-269, (Uniform Sales Act, Sec. 69), barring third-party plaintiff from thereafter seeking damages for consequential damages flowing from the defect in the original coil. The court therefore erred in awarding such consequential damages against third-party defendant in this action.

The record being presently unavailable for scrutiny of counsel, the page numbers upon which material pertinent to the points set out above may be found in the record cannot be determined. The documents particularly involved, however, are the trial court's findings of fact, 6, 7, 10 and 11, and his conclusions of law, 3, 4, 5 and 7, as they appear

in the record, and upon testimony of record in the transcript of proceedings, page numbers which are also presently unavailable to counsel.

MAY, LESHER & DEES,
/s/ By ROBERT D. LESHER,
Attorneys for Authorized
Supply Co. of Arizona.

Notice of Mailing Attached.

[Endorsed]: Filed December 24, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS OF APPELLANTS
ARIZONA YORK REFRIGERATION COM-
PANY AND SOUTHERN ARIZONA YORK
REFRIGERATION COMPANY

This appeal of Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company is taken in order to obtain a reversal of the judgment against said appellants in favor of defendant-appellee Swift & Company in the event the Court should rule favorably upon the appeal of Authorized Supply Company and against appellees Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company. The points upon which appellants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company will rely on appeal are:

1. The court erred in finding and entering its conclusion of law that Arizona York Refrigeration Company expressly warranted the fitness of the refrigeration system and component parts sold by it to plaintiff Swift & Company.

2. The court erred in finding and entering its conclusion of law that Arizona York Refrigeration Company impliedly warranted to Swift & Company the fitness of the refrigeration system and component parts sold to it.

3. The court erred in entering its conclusion of law that the defects in the bush coils which caused the escape of ammonia gas into plaintiff's plant on or about December 5, 1955, constituted a breach of express and implied warranties running from these appellants to plaintiff Swift & Company.

4. The court erred in finding that plaintiff and defendant Arizona York Refrigeration Company understood and contemplated that loss and damage to plaintiff's meat products would be the natural and probably consequence of a failure of the refrigeration system.

5. The court erred in finding and entering its conclusion of law that plaintiff did not elect a remedy which was inconsistent with the cause of action stated in the amended complaint, and did not thereby waive its cause of action by accepting the new Bush coils in place of the defective coils. Such replacement and return of the defective coils effected a binding and conclusive election of reme-

dies, which barred plaintiff from seeking or recovering consequential or any damages.

6. The court erred in refusing to grant judgment in favor of defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, and against plaintiff Swift & Company, for the reasons more particularly referred to in 1 through 5 above.

The original certified record is not presently available to the undersigned attorneys, and the page numbers of said record cannot be set forth herein as required by the provisions of Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit. The foregoing Statement of Points is particularly directed to the trial court's Findings of Fact Nos. 4, 7 and 11, and Conclusions of Law Nos. 2, 4, 5 and 6, together with the testimony contained in the transcript of proceedings and the pleadings of record.

DARNELL, HOLESAPPLE,
McFALL & SPAID,

/s/ By RICHARD C. BRINEY,

Attorneys for Appellants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.

Notice of Mailing Attached.

[Endorsed]: Filed December 26, 1958. Paul P. O'Brien, Clerk.